Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

In Re TRANSEURO AMERTRANS WORLDWIDE MOVING AND RELOCATIONS LIMITED

On Petition For A Writ Of Mandamus To The United States District Court For The Northern District Of Oklahoma

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether the district court abused its discretion in affirming the order of a magistrate judge precluding Petitioner Transeuro from deposing the Chief Executive Officers (CEOs) of Defendants Conoco and Phillips where: 1) it is undisputed that the CEOs were the instigators and principal participants in the merger negotiations; 2) there was no showing of good cause for a protective order; 3) Defendants are presently attempting to consummate the merger which will involve terminations and relocations of employees which will be difficult or impossible to reverse; 4) a preliminary injunction hearing is scheduled on September 11, 2002, and both of the CEOs are outside the subpoena power of the district court, and 5) the Federal Trade Commission has concluded that the merger as presently proposed violates Section 7 of the Clayton Act, 15 U.S.C. § 18.

PARTIES TO THE PROCEEDINGS

Transeuro Amertrans Worldwide Moving and Relocations Limited

Conoco Inc.

Phillips Petroleum Company

The Honorable Sven Erik Holmes, United States District Court Judge for the Northern District of Oklahoma

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10 percent or more of the stock of Petitioner.

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PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully petitions this Court for the immediate issuance of a writ of mandamus ordering the District Court of the Northern District of Oklahoma to allow Petitioner to depose the Chief Executive Officers of Conoco and Phillips prior to the scheduled September 11, 2002, preliminary injunction hearing.

OPINIONS BELOW

On August 27, 2002, Magistrate Judge Cleary of the Northern District of Oklahoma issued an order precluding Petitioner from taking the depositions of the Chief Executive Officers of Defendants Conoco and Phillips. (App. 49-50, 59-60)

On the afternoon of the same day, United States District Court Judge Holmes affirmed the order of Magistrate Judge Cleary precluding Petitioner from taking the depositions of the CEOs. (App. 80)

On September 4, 2002, the Tenth Circuit Court of Appeals denied Petitioner's petition for a writ of mandamus ordering the district court to allow Petitioner to take the depositions of the CEOs prior to the preliminary injunction hearing scheduled for September 11, 2002. (App. 1)

JURISDICTION

This is an action to enjoin a violation of the United States antitrust laws, specifically Section 7 of the Clayton Act, 15 U.S.C. § 18, over which this Court has jurisdiction

pursuant to 28 U.S.C. §§ 1331 & 1337(a), and Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. § 15. *See also Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the enforcement of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18.

STATEMENT OF THE CASE

Petitioner Transeuro Amertrans Worldwide Moving and Relocations Limited ("Transeuro") hereby petitions this Court to issue an order overturning an order of the district court entered on August 27, 2002 (the "Appealed Order"), affirming an order entered earlier the same date by Magistrate Judge Cleary, finding that the Magistrate Judge's order was not clearly erroneous or contrary to law. The Appealed Order, effectively granted a request for a protective order precluding Petitioner from deposing Archie Dunham ("Dunham"), Chief Executive Officer of Conoco, Inc. ("Conoco"), and James J. Mulva ("Mulva"), Chief Executive Officer of Phillips Petroleum Company ("Phillips"), prior to the hearing on Petitioner's Motion for Preliminary Injunctive Relief, set for September 11, 2002. As discussed below, the Defendants' own submissions to the SEC reflect that Dunham and Mulva were the principal persons involved in the negotiation of the challenged merger, a merger that the Federal Trade Commission found to violate Section 7 of the Clayton Act. The legislative history of the Clayton Act and Supreme Court cases interpreting the Act reflect the importance of private

enforcement of our federal antitrust laws. *See Reiter v. Sonotone Corporation*, 442 U.S. 330 (1979).

The actions of the district court below protecting corporate executives from being deposed where they have clearly been the principal parties involved in a challenged merger, and where there has been no showing of good cause for a protective order, seriously undermines the ability of private parties to enforce the provisions of the Clayton Act. The writ of mandamus sought should require the district court to allow Petitioner to depose Dunham and Mulva prior to September 11, 2002 in preparation for the hearing.

REASONS FOR GRANTING THE WRIT

A. Standards for the Issuance of a Writ of Mandamus

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Under the law of this court, "the petition must show that the writ will be in aid of the Court's appellate jurisdiction. . . . " Sup. Ct. R. 20. However, "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction. . . . " *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 109 S.Ct. 1814, 1822 (1989) (internal citations and quotations omitted). The petitioner seeking issuance of a writ of mandamus may do so by demonstrating that the district court has clearly abused its discretion. *See id.*

The petitioner must also demonstrate a lack of alternative means to obtain the sought after relief. *See id.*

B. Statement of Facts

On November 19, 2001, Conoco and Phillips announced plans for a $35 billion merger. Termed a "merger of equals," Conoco and Phillips have agreed to merge into ConocoPhillips, which will be the third largest petroleum company in the United States following ExxonMobil and ChevronTexaco. It would also become the nation's largest refiner and gasoline retailer.

The relevant markets for purposes of this case are petroleum refining and petroleum products marketing in the United States. These are products and services for which reasonable substitutes are not readily available. The price of gasoline could rise substantially without the substitution of other products replacing it. The United States is the relevant geographic market, inasmuch as this is the geographic area in which refiners and marketers of gasoline compete for distribution of their products, and to which buyers can turn for alternative sources of supply.

The relevant markets are characterized by high concentration and high barriers to entry. In the refining of gasoline in the United States, the ten largest firms account for approximately a 70 percent market share; the top six firms account for approximately a 50 percent market share. In United States gasoline service stations, the top ten firms account for approximately a 60 percent market share; the top six firms account for an approximate 45 percent market share. New entry in the relevant market is difficult, if not impossible, because of the entrenched power of firms already in the industry, including

Defendants; substantial environmental restrictions; and the requirement of substantial sunk costs (*e.g.*, the cost of refinery construction or acquisition), which cannot be recovered in the event entry is unsuccessful.

The relevant market is also characterized by a recent trend of increasing concentration through mergers and acquisitions, which has included the following combinations: BP-Amoco (August 1998); Exxon-Mobil (December 1998); BP-Amoco-ARCO (May 1999); Chevron-Texaco (October 2000); Phillips-Tosco (February 2001); Conoco-Gulf Canada Resources (May 2001); Valero-Ultramar Diamond Shamrock (June 2001); and now potentially Phillips-Conoco (announced November 2001).

If Defendants' merger is consummated, one result will be to put pressure on the remaining mid-tier major oil companies, including Marathon, Valero (Ultramar Diamond Shamrock), Sunoco, and Amerada Hess, to merge with a complementary regional partner or be acquired by one of the super-major oil companies, which will include ExxonMobil, ChevronTexaco, BPAmocoArco, and Defendants' merged company, ConocoPhillips.

Transeuro has filed a lawsuit claiming that the proposed merger violates Section 7 of the Clayton Anti Trust Act, 15 U.S.C. § 18.

On August 30, 2002, the Federal Trade Commission announced that it had concluded that the merger as proposed violated Section 7 of the Clayton Act as well as Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. (App. 150)

The appealed order precludes Petitioner from deposing the Defendants' CEOs although the Defendants' own

submissions to the Securities and Exchange Commission ("SEC") make it clear that Dunham and Mulva were not only participants in the merger discussions, but also are the persons most knowledgeable regarding the history and purposes of a merger which has been found by the FTC to be violative of Section 7 of the Clayton Act. (App. 96-106, 150)

As reflected in the joint S-4 submission to the SEC by Defendants, the genesis of the merger between Conoco and Phillips was a discussion between Dunham and Mulva, in June 2000. After that discussion, these two CEOs took the following steps toward an illegal merger:

- Several meetings and discussions between Dunham and Mulva ensued during the summer of 2000.
- In October 2000, Dunham proposed merger terms to Mulva, including the roles of Dunham and Mulva in the merged company.
- Talks were suspended for a time, and in the interim, in September 2001, Phillips acquired Tosca Corporation, the fourth largest independent refiner and retail marketer of petroleum.
- On September 10, 2001, the Phillips Board of Directors authorized Mulva to contact Dunham to initiate discussions about a merger.
- Mulva contacted Dunham the week of September 10 to schedule a meeting to take place on September 28, 2001.
- A meeting was held on September 28, 2001, between Mulva and Dunham in Oklahoma City to discuss the terms of the merger.
- On October 8, 2001, Mulva reported to the Phillips Board regarding his meeting with Dunham.

- The Phillips Board of Directors authorized Mulva to continue his discussions with Dunham.
- Throughout the period of October 3 through November 17, 2001, Mulva had regular telephone contact with the Phillips Board regarding the pro gross of the merger negotiations and discussions.
- On October 8, 2001, Dunham met with the Conoco Executive Committee regarding the status of the merger discussions.
- On October 11, 2001, Mulva and Dunham had a follow-up telephone conference regarding merger proposals, and agreed to meet in Houston on October 16, 2001.
- On October 16, 2001, Mulva and Dunham met in Houston "to discuss each company's vision, strategies, long-range objectives, values and culture."
- On October 24, 2001, Dunham and Mulva spoke by telephone, and Dunham advised Mulva that he would discuss the proposed merger at the upcoming meeting of the Conoco Board of Directors.
- At the October 30, 2001, Conoco Board of Directors meeting, Dunham reported on his discussions with Mulva. The Conoco Board of Directors authorized further negotiation of terms.
- On November 1, 2001, Dunham and Mulva again met in Houston to discuss terms of the merger.
- On November 4, 2001, Dunham and Mulva spoke again by telephone regarding the proposed merger.
- On November 6, 2001, Conoco and Phillips entered into a confidentiality agreement to govern the due diligence process.

(App. 96-106)

It was not until this point, almost eight months after the initiation of merger discussions between Mulva and Dunham, that Mr. Frederickson, a Conoco Vice President, and Mr. Lowe, a Phillips Vice President, became involved sufficiently to merit disclosure in the S-4. According to the S-4 Frederickson and Lowe met in New York at that time merely to "deal with the details such as financial and accounting issues and potential synergies arising from combining the two companies." (App. 101)

The appealed order only allows Transeuro to depose Mr. Frederickson and Mr. Lowe, but precludes, without any showing of good cause, deposition of the two individuals with the most relevant knowledge, CEOs Mulva and Dunham. Given the Defendants' own admissions regarding the central roles of Mulva and Dunham in coming to agreement on the challenged merger, the district court clearly abused its discretion by denying Petitioner access to these key witnesses in advance of the hearing. Indeed, Dunham and Mulva reside outside of the jurisdiction of the court, and if Petitioner is not allowed to depose them before the September 11, 2002, hearing, their testimony will be lost to the fact-finder altogether.

C. The Court's Order Denying Petitioner the Right To Depose Key Witnesses in Advance of a Key Hearing Without a Showing of Good Cause Is Clearly Erroneous

1. Corporate Officers, including CEOs, Are Subject to Deposition Where the CEO Has Relevant Information and There Has Been No Good Cause Shown for a Protective Order

Petitioner seeks to depose the Defendants' CEOs based upon a history generated by Defendants which

clearly shows that the CEOs are the knowledgeable witnesses regarding the history and purpose of the merger sought to be challenged under the antitrust laws. In such circumstances, even the highest officers of a party are subject to deposition unless there is good cause shown for the issuance of a protective order.

It is axiomatic that, under Rule 26(b) of the Federal Rules of Civil Procedure, discovery is allowed regarding any matter "which is relevant to the subject matter involved in the pending action" and may be used to obtain information which "appears reasonably calculated to lead to the discovery of admissible evidence." *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 146 (D. Mass. 1987). "Highly-placed executives are not immune from discovery" [and] "the fact that [an executive] has a busy schedule" cannot shield that witness from being deposed. *Consolidated Rail Corp. v. Primary Indus. Corp.*, Nos. 92 Civ. 4927 (PNL), 92 Civ. 6313 (PNL), 1993 WL 364471 at *1 (S.D.N.Y. Sept. 10, 1993) (quoting from *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984)); *Six West Retail Acquisition, Inc. v. Sony Theater Management Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001). There is no "special rule" protecting high-ranking corporate executives from deposition discovery. *Kuwait Airways Corp. v. American Security Bank*, Civ. A. No. 86-2542, 1987 WL 11994 (D.D.C. May 26, 1987).

Even where a high-ranking officer denies personal knowledge of the issues at hand, courts have concluded that this "claim . . . is subject to testing by the examining party." *Consolidated Rail Corp.*, 1993 WL 364471 at *1; *Less v. Taber Instrument Corp.*, 53 F.R.D. 645 (W.D.N.Y. 1971).

The party seeking the deposition of the corporate officer does not have the burden to justify the decision to depose the officer. Rather, the party seeking protection from the deposition has a heavy burden to show "good cause" exists to prevent the deposition from going forward in order to "protect a party or person from annoyance, embarrassment, oppression or undue burden and expense." Fed. R. Civ. P. 26(c); *CBS*, 102 F.R.D. at 822; *Pepsi-Cola Bottling Co., Inc. v. PepsiCo, Inc.*, Civil Action Case No. 01-2009-KHV, 2002 WL 922082 (D. Kan. May 2, 2002); *Kuwait Airways Corporation*, 1987 WL 11994 at *2; *Simpson v. Home Depot, Inc.*, Civil Action No. 00-2285-JAR, 2002 WL 485661 (D. Kan. Mar. 7, 2002).

The burden of showing good cause for a protective order is particularly formidable when there is a showing that the corporate officer may well have knowledge of relevant facts. *Bridgestone/Firestone, Inc., Tires Products Liab. Litig.*, 205 F.R.D. 535 (S.D. Ind. 2002) (Chairman of the Board of Ford Motor Company deposed where he had knowledge); *Six West Retail Acquisition*, 203 F.R.D. at 104; *Travelers Rental Co.*, 116 F.R.D. at 143.

In this case, as we have seen, Defendants' own submission to the SEC makes it clear that the CEOs of Conoco and Phillips are not only knowledgeable regarding the proposed merger, but are the most knowledgeable regarding that transaction. Moreover, neither Conoco nor Phillips have denied this fact, or submitted evidence approximating good cause for a protective order.

The fact that it is evident to all parties that the CEOs have relevant knowledge distinguishes this case from the cases relied upon by Defendants. In *Thomas v. IBM*, 48 F.3d 478 (10th Cir. 1995), the Court affirmed the issuance

of a protective order of the Chairman of the Board of IBM where IBM submitted an affidavit indicating that the Chairman did not have knowledge relating to plaintiff's employment claim. In *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989), the Circuit Court again affirmed the district court's protective order where the record showed that the corporate officer involved had no knowledge of the employment claims of plaintiff, and that the notices of deposition were issued in bad faith. In *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985), the district court issued a protective order where the Chairman of the Board of Chrysler submitted an affidavit indicating lack of knowledge regarding the subject matter of the deposition. In *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), a protective order was affirmed where the president of the company indicated that he had no direct knowledge of the facts. In *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991), a protective order was granted where the corporate officer professed that he had no superior or unique personal knowledge of the alleged product defect.

In this case, Petitioner was precluded from taking the depositions of the CEOs absent any showing of good cause by Defendants. Judge Holmes specifically asked counsel for Phillips why Mr. Mulva could not be deposed, for example, and Phillips counsel gave no cognizable reason for Mulva not to set for his deposition. (App. 79-80) The denial to Petitioner of access to key witnesses prior to a critical hearing with no showing of good cause is clearly erroneous.

2. The Issue Presented Is Of Extraordinary Importance

a. No Special Classes

One of the fundamental tenants of our legal system is the equal protection of the law. In the United States, there are no castes or special privileged classes under the law, no kings, queens, princes or princesses who stand above the reach of the law. Yet, where a CEO, or other high corporate officer, is protected from being deposed where he or she clearly possesses critical knowledge, and has made no showing why he or she should not be deposed, the core principle of equal protection is compromised. This Court should not create a protected class of witnesses in conflict with core principles governing the founding of this country. As suggested in the cases cited by Defendants at the August 27, 2002 hearings, recent court decisions have tended to give deference to corporate executives in what arguably are inappropriate circumstances.

b. Court Should Not Interfere With The Pursuit of Legitimate Litigation Strategies by Experienced Anti-trust Counsel

In this case, Petitioner is represented by counsel with considerable experience in the anti-trust area. It was the considered judgment of Petitioner's counsel that the most effective and efficient way of preparing for the pending injunction hearing was to depose the CEOs who actually negotiated the merger. Defendants argued that depositions should be phased so that lower level corporate employees should be deposed first. In denying Petitioner's request without a showing from Defendants of good cause for a protective order, the district court, in effect, substituted its

judgment for that of experienced anti-trust counsel in determining how Petitioner should prepare and prosecute its claims. Under the Federal Rules of Civil Procedure, plaintiff clearly has the right to the information sought, and the district court should not be allowed to substitute its judgment for that of experienced anti-trust counsel on matters of litigation strategy.

3. Experience in Both the Public and Private Sector Indicates That In the Anti-Trust Context, Deposition of the Corporate Executives Who Negotiated the Merger Is the Most Effective and Efficient Strategy

The experience of the Federal Trade Commission in its role as the enforcer of this nation's anti-trust laws is that "the agencies have found from past experience that the viewpoints of the participants are *extremely valuable* in analyzing the anti-trust implications of an acquisition and have determined that some of these perceptions are *indispensable* to the preliminary review envisioned by the [Hart Scott Rodino] act" (emphasis added). (App. 127)

This is precisely the same judgment as that of Petitioner's counsel. History shows that when the executives who actually negotiated the merger are questioned first, such executives are able to articulate the motive, intent, purposes and history of the proposed merger. In addressing these issues, they are further able to identify the documents upon which they actually relied so that counsel for the challenging party is able to quickly identify and use those documents that go to the heart of the issue. If Petitioner is forced to question only lower level corporate representatives, the realities of the proposed merger will be difficult to ascertain and not readily susceptible of proof

at the looming hearing. By protecting corporate executives from deposition without a showing of good cause at this critical phase in the proceedings, the district court has undermined the effective and efficient enforcement of the nations anti-trust laws.

4. Phased Discovery Is Impractical Given Time Constraints

On August 22, 2002, the district court denied Petitioner's Motion for Temporary Restraining Order and ordered that a hearing be held on September 11, 2002 on Petitioner's Motion for Preliminary Injunction. As of August 30, 2002, Conoco and Phillips consummated the merger and a new corporate structure was formed. Implementation of the merger will involve major relocations of many employees from both Conoco and Phillips and the termination of many other employees from both companies.

Courts have recognized that injunctive relief can become difficult or impossible if the challenged transaction is allowed to go forward. *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1093) (" . . . once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs'"); *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 846, 851 (3d Cir. 1973) (per curium); *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969); *Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687, 698 (2d Cir. 1973).

Given the scope of the proposed merger, it is uncertain whether Petitioner later could obtain an effective injunction if the motion for a preliminary injunction is denied. In effect, therefore, Petitioner must make its case that the proposed merger violates Section 7 of the Clayton Act at preliminary injunction hearing on September 11, 2002. Given such time constraints, phased discovery is not realistic, and it is imperative that Petitioner be allowed to take the depositions of the Defendants' CEOs immediately.

CONCLUSION

On the basis of the foregoing arguments and authorities, Petitioner respectfully requests that its petition for a writ of mandamus be granted.

Date: September 6, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: TRANSEURO AMERTRANS WORLDWIDE MOVING AND RELOCATIONS LIMITED, Petitioner.	No. 02-5140 D.C. 02-CV-342-H (Northern District of Oklahoma)

ORDER
Filed September 4, 2002

Before **KELLY** and **BRISCOE**, Circuit Judges.

This is an original proceeding in the nature of mandamus. Petitioner seeks an order from this court directing the district court to permit it to depose the chief executive officers of Conoco, Inc. and Phillips Petroleum Co. during the week of September 3, 2002.

Upon consideration, the petition for writ of mandamus is denied. Petitioner has not shown that its right to issuance of the writ is clear and indisputable or that it has no other adequate remedy. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

Entered for the Court
PATRICK FISHER, Clerk

By: A.J. Schuler
Deputy Clerk

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRANSEURO AMERTRANS, ET AL, Plaintiffs,	)	
vs.	)	Case No. 02-CV-342-H-(C)
CONOCO, INC., ET AL, Defendants	)	

PROCEEDINGS

HAD AUGUST 27, 2002

BEFORE THE HONORABLE PAUL J. CLEARY,
MAGISTRATE JUDGE

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[3] PROCEEDINGS

August 27, 2002

THE CLERK: This is the matter of Transeuro Amertrans versus Conoco, Inc., Case Number 02-CV-342-H. Will the parties please enter their appearance.

MR. BEASLEY: On behalf of the plaintiff, Bradley K. Beasley.

MR. ALIOTO: Joseph M. Alioto.

MR. BRAMAN: Richard G. Braman.

MR. MOLONEY: Lawrence A. Moloney.

THE COURT: And on the defense side.

MR. WOHLGEMUTH: On behalf of the defendant Phillips Petroleum, Joel Wohlgemuth and Bill O'Connor.

MR. PEZOLD: And for Conoco, Your Honor, Bob Pezold, Joe Woltz. From Cleary Gottlieb, Sara Schotland, Brian Byrne who would like to move his admission pro hac vice for purposes of these proceedings, and Mr. Russ Howell.

THE COURT: All right. Fine. We'll – and who is it that we're admitting pro hac?

MR. PEZOLD: Mr. Brian Byrne, Your Honor.

THE COURT: All right.

MR. PEZOLD: And I have his affidavit here. We'll see that the completed application is filed with the clerk at the close of the hearing.

THE COURT: Okay, that's fine. Sure, he'll be [4] admitted pro hac, for purposes of this matter.

MR. BEASLEY: Thank you, Your Honor. Your Honor, we previously filed one yesterday afternoon and the others this morning, motions to admit two of the attorneys here this morning, pro hac vice, Mr. Richard Braman and Mr. Lawrence Moloney. And I believe you have copies of those in front of you, Your Honor.

THE COURT: I don't think I've received them yet, but if you're assuring me they're in the system, that's fine, we'll admit them pro hac for purposes of this matter.

MR. BEASLEY: Thank you, Your Honor.

MR. BRAMAN: Thank you, Your Honor.

THE COURT: And there's one matter I need to address out of the chute here. Mr. Woltz, who I'm not even sure – is that Mr. Woltz? It's the first time I've even seen

Mr. Woltz. Mr. Woltz' wife Barbara works for me as a law clerk.

She is not involved in this case at all, won't be involved in this case at all. We've isolated her from it for obvious reasons.

So I just wanted to make sure that everybody was aware of that up front, so that we can go on down the road. As I say, she's not involved in this case and isn't going to be privy to any of the information in this case.

So with that, I have looked at the joint submissions of the parties and I have before me your motion for agreed [5] protective order. And I've signed that – I've made one addition to that document, just a sentence under paragraph 1 that says, the parties shall designate as confidential, only such documents/testimony as they believe in good faith to be confidential.

Just to make more express the fact that we're going to avoid overdesignating materials as confidential. And if that – if that one change is acceptable, then, I have signed that document and we have copies for everyone.

MR. BEASLEY: It is, Your Honor.

MR. WOHLGEMUTH: Yes, Your Honor.

THE COURT: All right, fine. Howard, we've kept – there's the original on top of that.

All right. With that, I understand the parties have been trying to put together some sort of a schedule. And let me say, originally this matter came before the Court on some motions to sequence discovery.

Now, that issue although I don't know that it is entirely moot, but we're moving forward toward the preliminary injunction hearing on the 11th, correct?

MR. WOHLGEMUTH: Yes, that's correct, Your Honor.

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: So the whole issue of whether we're sequencing discovery, I think, is, if not moot, then certainly on the back burner while we try to address the issues of [6] exactly what discovery we're going to start with?

MR. WOHLGEMUTH: That's correct, Your Honor.

THE COURT: Okay. Who wants – what issues remain to be resolved that the Court can help you with? I understand that you've got – we have agreement on several depositions, the deposition of Mr. Frederickson and the deposition of Mr. Lowe, Frederickson on September 4th, Lowe on September 6th.

MR. WOHLGEMUTH: Your Honor, there's one, if I might mention, that we did indicate in our papers that Mr. Lowe was available on the 6th. He has – he had a conflict on that date that we did not pick up. And I would state that he would be available on the 3rd, 4th, or 5th.

And probably in that order would be preferable, from our standpoint, but the 6th is a problem that we weren't aware of at the time.

THE COURT: And he would still be available in Tulsa?

MR. WOHLGEMUTH: I – he would be available – we would prefer to make him available in Houston because he actually is in Houston now as part of the company's operations.

And if that were to fit the plaintiffs, it certainly is much better for Mr. Lowe and for us.

THE COURT: Okay.

MR. WOHLGEMUTH: And that's where the Frederickson deposition was intended to be also.

THE COURT: All right.

[7] MR. WOHLGEMUTH: Thank you.

THE COURT: Mr. Beasley, are you taking the lead on this matter?

MR. BEASLEY: No, Your Honor, Mr. Alioto will be taking the lead.

THE COURT: Okay. Mr. Alioto, what's your response to Mr. Lowe's – to moving Mr. Lowe's deposition to the 3rd, 4th or 5th, in Houston?

MR. ALIOTO: That will be fine, Your Honor.

THE COURT: Which day, 3rd?

MR. ALIOTO: Which day would you –

THE COURT: You have Frederickson scheduled on the 4th, in Houston.

MR. ALIOTO: Then Mr. Lowe on the 3rd in Houston, is that the request, Your Honor?

THE COURT: That was – I think that was the first preference.

MR. ALIOTO: Yes, that's fine, Your Honor.

THE COURT: All right.

MR. ALIOTO: Sorry, Your Honor. Could we do Mr. Lowe on the 5th instead of the 3rd?

MR. WOHLGEMUTH: Yes.

THE COURT: Okay. All right. So we have Frederickson on the 4th; Lowe on the 5th, both in Houston.

MR. ALIOTO: Yes, sir.

[8] THE COURT: Okay. All right. What about the issue of the experts? There was a request to take Mr. Kalt's deposition on the 9th. I saw a statement here that he had some duties at Harvard on the 9th. But when can we get the experts' depositions on both sides?

And, first of all, do we know whether plaintiff has – have they identified an expert at this point?

MR. ALIOTO: I believe that we have, but I'm not sure, Your Honor. His name is Professor William Comanor.

THE COURT: Is that C-O-M-M-O-N-E-R?

MR. ALIOTO: One M, Your Honor.

THE COURT: C-O-M-O-N-E-R, okay.

MR. ALIOTO: I believe it's A, Your Honor, C-O-M-A.

THE COURT: A-N-E-R, Comaner.

MR. ALIOTO: And I believe it's O-R, Your Honor.

THE COURT: All right. C-O-M-A-N-O-R.

MR. ALIOTO: Yes, sir.

THE COURT: Okay. Are the – did the defendants have that name and has any effort been made to schedule that deposition?

MS. SCHOTLAND: Your Honor, Sara Schotland, for Conoco. This is the first time we have heard the name. So we don't have dates. Our suggestion was going to be that since the plaintiffs have the benefit of Professor Kalt's opinion, it may be more logical for us to depose the plaintiffs' expert [9] first and then have the plaintiffs depose Professor Cault.

We have several days when Professor Kalt is available, just, it happens, not the 9th, but we've got, for example, he'd be available on the 6th, he'd be available on the 7th, he'd be available on the 8th, he'd be available on the 10th, in Boston. We have a bunch of dates when it's possible.

THE COURT: Okay.

MS. SCHOTLAND: But we would like to have, if we could, an agreement on, I think first hearing the plaintiffs' economic experts, or Professor Kalt can come and –

THE COURT: Okay. That may seem sensible to me, but, Mr. Alioto, what's your position on that?

MR. ALIOTO: If it please Your Honor, I think that, as I understand it, Professor Comanor will not be available until the 9th. So we can make the 9th the date if that's convenient.

Now, whether or not his deposition should be before Professor Kalt, I mean, I suppose I would think that they should be at the same time, and – or about the same time.

It is correct that Professor Kalt did present his report and it was part of the, apparently part of the motion originally for the preliminary injunction, but it was used as part of the exhibits for the temporary restraining order.

Frankly, I don't have an awful lot to say about this issue, one way or the other, Judge. Everybody's just trying to make the time as much as they can. I don't think it's a [10] tactical issue as it is simply a calendar issue.

THE COURT: What about having – where will Mr. – Professor Comanor be available for deposition?

MR. ALIOTO: He's going to be in Los Angeles, if that's convenient. Now, we do have Mr. Shulman who wants to take the deposition of Professor Kalt. And Mr. Shulman will be arriving – will not be back until, I believe, the 8th.

THE COURT: Why don't we schedule Comanor's deposition in Los Angeles on the 9th and Cault's deposition in Boston on the 10th?

MR. ALIOTO: The only –

THE COURT: Will that work?

MR. ALIOTO: – okay, the only problem with that, I would – I would respectfully submit, Your Honor, is

that if Dr. Kalt is going to attend the Comanor deposition on the 9th, he probably would not be able to make it to Boston for his deposition the next day.

I don't think – I think – unless he did an all-nighter.

MS. SCHOTLAND: Your Honor, he's not available on the 9th, so that's not an issue.

THE COURT: So that's not an issue. Okay. All right. So let's schedule the Comanor deposition to take place in Los Angeles on September 9th and the Kalt deposition in Boston on September 10th. And you folks can work out the times.

[11] MR. ALIOTO: All right, sir.

THE COURT: All right. I know we've got issues here on the CEOs but let's defer those for a second because I think we've got some document issues as well.

I understand that the plaintiffs have requested all of the Hart-Scott-Rodino documentation that was provided to the FTC, and the defendants have said they feel that's too much and have offered documents from the files of Mr. Frederickson and Mr. Lowe.

Has there been any further discussion between the parties on how to try to –

MR. BRAMAN: Your Honor, Richard Braman. Sara Schotland and I spoke this morning in an effort to try and close the gap. We were unsuccessful.

Briefly stated, plaintiffs are seeking the entire HSR filing because those are the documents the FTC needed to look at. The (inaudible) anticompetitive consequences of

the merger, the whole purpose of the Hart-Scott-Rodino Act is to get those materials in front of the government.

This is a unique situation. Even though we are in a short period of time to conduct discovery, all of the documents have been collected, they've been reviewed for privilege, they've been Bates numbered, they're scheduled. It's not like we're asking the defendants to go out on a search and collect documents. That's all been done.

[12] We're simply saying, open up the same room and you have all these boxes of files that are CDs or in whatever format they're in, so that we can see the same documents that the FTC has to examine the antitrust consequences of the merger.

THE COURT: All right. And from the other side?

MR. WOHLGEMUTH: Yes, Your Honor. If I may make a preliminary statement for Phillips on the document issues. And then I'll ask Ms. Schotland, if the Court deems it appropriate, to continue with some specific comments on the Hart-Scott-Rodino documents.

Your Honor, just generally speaking, with respect to the question of what the scope of document production should be, we believe that this analysis should be made within the context of where we are at this point, in anticipation of the preliminary injunction hearing, together with the case law which – and I know that Your Honor has seen this before in one of the key cases, in fact, it's out of the District of Minnesota, which basically recognizes that an accelerated discovery schedule in anticipation for a preliminary injunction hearing is intended to be a limited production.

The production that we have proposed is a – exceeds any concept of limited production. But I want to get to, if I can, the reasonableness, from our view of what we have proposed.

[13] As the Court's aware, at the preliminary injunction – I'm sorry, the temporary restraining order hearing that occurred on the 22nd, as a result of that hearing Judge Holmes denied the temporary restraining order and determined that the plaintiffs did not meet – or the plaintiff did not meet any of the four steps required under our law to establish its right to preliminary relief for a TRO.

And the Court stated at the conclusion, with respect to the threshold issue, even of standing, that the Court would accept the question of standing for the purposes of these proceedings with the admonition that it had serious questions about whether standing, in fact, either exists or can be proven in the case.

The court went on to say that there is nothing at this time from which to even gauge any injury at all to this plaintiff. The Court further stated that the balance of harm weighs heavily in favor of defendant. These are at page 119.

At page 120 of the transcript, the Court says, "There is no basis upon which to claim that there's an appreciable danger that prices will rise and that there is nothing at the stage that would compel the conclusion that the likelihood of success on the merits favors the plaintiff."

So at this point in time we are dealing with a plaintiff that has, at best, dubious standing, that has established a marginal case, but is certainly entitled to [14] proceed, and

the Court has recognized with discovery and the preliminary injunction hearing.

In that – in that regard, Your Honor, and I think – I think for – for the Court to have an appreciation of where we are in discovery, this case was filed on April 30th of 2002, which was several months after this merger was announced in November of 2001.

We had a Rule 26 conference in June. Essentially, the issue that was debated at that time was the plaintiffs' request for depositions of the chief executive officers with the defendants opposed, for the reasons that we've indicated to the Court in the joint filing that was made yesterday.

But during this entire period, and even up until the August 20th filing of a temporary restraining order, the plaintiff never took any discovery at all, that is, did not make a single document request, did not notice any depositions, 30(b)(6) or otherwise, never took any steps which it could have otherwise have started to take at the – at the very latest, in June, after the Rule 26 conference.

So now we are looking at a three-week period between the TRO and the preliminary injunction. And we feel that, for purposes of preparation, under these discrete circumstances, there has to be reasonable limitations.

And we further have tried to indicate to Your Honor the – what the broad scope is of the Hart-Scott-Rodino [15] productions that are at issue, which are literally millions of documents that are extremely confidential.

There's any non – and I think, from your experience, Judge, you can appreciate the fact that documents that are provided under the Hart-Scott-Rodino request cannot be

disclosed under FOIA. Any nonconsensual disclosure is punishable by criminal penalties.

There are vast amounts of information which Ms. Schotland can discuss further that relate to markets beyond the specific markets that are at issue here.

There are potential future mergers, there are presentations about markets and issues that have nothing to do with this procedure at all.

So just saying that we want to take a look at all of the documents that necessarily go to the FTC in connection with this proposed transaction, really begs the issue of what is reasonable discovery.

I would like to, if I may, have Ms. Schotland talk more specifically about the relationship between the documents that we have proposed and the issues that are still at hand and what some of the pragmatic questions are that are implicated by a broad request for the Hart-Scott-Rodino documents.

THE COURT: Okay, that would be fine.

MR. WOHLGEMUTH: Thank you, Your Honor.

MS. SCHOTLAND: Your Honor, I don't believe – Sara [16] Schotland, on behalf of Conoco. Your Honor, I don't believe I need to add a great deal to what Mr. Woltz has said, except just to emphasize as we try to state succinctly in terms of our position in the joint discovery filing.

But these documents from the files of Frederickson and Lowe, who are very senior officers and responsible

officers, contain the key, core documents with respect to the allegations that plaintiffs have made in this case.

That is to say, they refer to competition in the relevant markets as defined by the complaint. And when I say refer, we'd provide all the documents that discuss or refer to competition in the relevant markets as defined by the complaint, including market share, relative strength, the weakness of a company, vis-a-vis its competitors, supply and demand position as well as benefits, costs and risks related to the transaction, documents related to the transaction. It is a very substantial production.

We have had juniors working since the TRO hearing. Literally, as of 8:00 Saturday, we have had a large team to ready those documents so that we can provide them promptly to plaintiffs and not to (inaudible) them.

And we think that that is a reasonable production in light of the status of this case. We think it's fair, given not only that we are at the preliminary injunction phase. We think it's fair, given that we have sort of a crisis of [17] plaintiffs' own making in terms of a very short period of time to produce documents.

And we think that when plaintiffs see these documents they're going to appreciate that they have plenty of fodder for their expert to render an opinion.

Thank you.

THE COURT: Ms. Schotland, just one question. As I understand it, you're offering up, I think it's been estimated at about 10,000 pages of documents from the files of Frederickson and Lowe.

MS. SCHOTLAND: Yes.

THE COURT: Are there – are there other sources for documents of the type that you've described, in here, that would come from places beyond the files of Frederickson and Lowe?

MS. SCHOTLAND: Your Honor, unfortunately, the way these Hart-Scott-Rodino filings are made, they are segregated, not by product, as might seem logical, ab initio, they are provided on the basis of specifications like competition. Give me all your documents that relate to competition, give me all your documents that relate to the transaction. Very broad specifications. And then they're produced by custodians.

So one really have to go through – and that's the problem here, go through 3 million documents to ferret out what is truly relevant to the complaint.

[18] Essentially what happens in the Hart-Scott process, as I believe Your Honor may be aware, is there is an initial filing that is made and that initial filing is itself quite a serious filing.

That is a filing that is what the antitrust agencies use to decide, you know, whether they should go forward. And it only after that initial filing has been made that the agency comes back and issues that second request.

And that second request essentially requires the merging parties, if they want a prompt approval, to turn over all their files. And there's just no other easy way of producing documents that are limited to what's relevant to the complaint.

Now, here the plaintiff has chosen four individuals who they think have relevant files. We think that Frederickson and Lowe's files, it is in fact the case from our

review over the weekend that they have substantial numbers of relevant files. And we think that that is the logical – the logical way to begin this production in the time period allowed.

THE COURT: What is – the initial Hart-Scott-Rodino filing, are there documents in there that would not be included in the Frederickson and Lowe documents, do you know?

MS. SCHOTLAND: Yes, Your Honor. There is an initial Hart-Scott-Rodino filing. In candor to Your Honor, that is something that conceivably could be made available to the [19] plaintiffs if we would be able to redact, because some of those documents include future business transactions, it includes personnel matters that are confidential. We'd need to be able to be sure that we were, again, limited to what is relevant here with a right to redact.

But that is a filing that addresses the documents that are prepared by or for officers or directors that analyze the transaction with respect to the markets and the market share and competitors and competition, and that would be another substantial swath.

THE COURT: Okay. Are we – are you convinced that Frederickson and Lowe have in their file, that they are in effect the custodians of all the key and core documents that would be necessary, say, for a preliminary injunction hearing?

MS. SCHOTLAND: The word "all" puts me to the same difficulty if a lawyer is asked, is there any case in U.S. Law, which I can't say "all" but I can say that they do include some key and core documents.

These men were involved in the negotiations leading up to the transaction. They are really key in terms of having – it's not only senior positions within the company having been involved in planning and strategy, having been involved in refining and marketing, and their bios available to the plaintiffs on the website, and which we have briefly summarized in the – in the plan, yes, they are the men who are key men, [20] some of the more key officials, and their documents – their files do have relevant documents that are core to analyzing national markets in crude oil and gasoline.

THE COURT: And I guess my only concern is that those files contain sufficient documents to enable the plaintiffs in this case to prepare for and put on evidence at the preliminary injunction hearing.

MS. SCHOTLAND: And that's a fair point, and I believe the answer to that is yes, Your Honor.

THE COURT: Any comment from plaintiff?

MR. ALIOTO: Yes, sir.

THE COURT: Mr. Alioto.

MR. ALIOTO: Thank you.

May it please Your Honor. I certainly do not like to be distracted by a red herring, but nonetheless, since a couple were dragged across the courtroom I think I ought to mention then why the Court ought not be influenced by the statements made with regard to them, as a preliminary matter.

As the Court is well aware, there are plenty of preliminary injunctions that are granted where the

temporary restraining order is not. A temporary restraining order is a highly different type motion. And the ruling by the Court on the temporary restraining order has no impact on the preliminary injunction.

The very court that denied the motion for temporary [21] restraining order granted the expedited hearing on the preliminary injunction.

The motion was not made with regard to that; the Court did it on – sua sponte. I could get into some of the issues that were raised with regard to dubious standing, as a matter of fact or law, but, of course, the court, the lower court – I mean, the District Court did not issue any decision, even on the temporary restraining order, with regard to standing.

THE COURT: Right, I'm aware of that.

MR. ALIOTO: Yes, sir, okay. I would like to point out too, Your Honor, that we have taken the position that September 11th should not only be used as the preliminary injunction but also should be used as the trial on the merits, because the issues, of course, would be the same and discovery will be granted. And so therefore, it should be on the merits as a trial. And that's the position we will take with the Court. Of course, that's up to the Court, but we will be – it will be the same proceeding.

It was mentioned also, as a preliminary statement, so that the Court would be aware of it, that the plaintiff never took any discovery in this case.

Your Honor, this has been a troubling matter because – before Rule 26 it was very easy. We used to file the complaints and we used to file the interrogatory requests

and the document requests and we tried to take the depositions [22] within 45 days, as soon as we could.

Rule 26 changed all of that. Rule 26, a real Rule 26, if the Court is aware of the history in this case, the Court is aware of the fact that the defendant sought to take discovery without regard to Rule 26. They pretended that a initial contact was the equivalent of a meet and confer under Rule 26. The prior magistrate quashed their efforts and ordered that Rule 26 be complied with.

There was a subsequent meeting or telephone conference with regard to Rule 26 and none of the orders out of Rule 26 which were supposed to do, happened.

And we're in this position and have been in the position, whatever request we make, they can't be complied with unless the defendants wish to comply with them. That's when they filed their motion to sequence.

So the fact of the matter is, either Rule 26 – either we're going to be proceeding under Rule 26 or we are not, and if we are not, we should be told.

And it was, as the Court is well aware, in the initiation of discovery without a Rule 26 order is inappropriate and improper, and in some jurisdictions, sanctionable.

THE COURT: Mr. Alioto, I think – I think Magistrate Judge McCarthy dealt with that Rule 26, the lack of a Rule 26(f) conference before. So it's not helping me here to really [23] retry that.

MR. ALIOTO: Okay.

THE COURT: I understand that – your position on that. And my point is that we need to figure out a way

to start the discovery rolling so that you've got enough material for your hearing on the 11th and we can get the depositions set up in a reasonable manner, that they can get the standing discovery that I understand they want, and that we can just get the ball rolling here.

MR. ALIOTO: Thank you, Your Honor.

I mentioned that I didn't want to talk about the red herrings and maybe I shouldn't have. The point is, I get the kind of discovery that is necessary, that could not only go to the merits but also lead to other discovery, just under the same rules with regard to discovery.

From the very beginning in this case, even prior to those Rule 26 issues, we sought, basically, the depositions of the chief executive officers and the Hart-Scott-Rodino filing.

The Hart-Scott-Rodino filings are the filings made by the defendant, with regard to the merger. And these are the documents that they have determined are relevant.

When you get to the second request, they have a choice. Their choice is, they can refuse to give those documents and chance a decision one way or the other by the FTC, or they can take the position, okay, they can forget about [24] the merger, or they can hand over the documents, the further documents the FTC requests.

These are voluntary efforts and obviously they're entitled to make any kinds of objections that they want to with regard to any of those requests.

The simple fact of the matter is that every document given to the FTC by these defendants was given under the basis that they believe that the FTC either wanted them

or should have them without objection in order to affirm or take no action on the merger.

As a result, they have determined the relevancy themselves. That's what a Hart-Scott-Rodino filing is in a merger case.

In this case also, Your Honor, there is absolutely no burden to the defendant. As a matter of fact, as you heard from counsel, if there is any burden, it is their efforts to try to go and segregate documents out of the Hart-Scott-Rodino filing.

And they also stated to the Court the procedure in which those documents are given to the Federal Trade Commission. And as a result of that, they are telling us, and they've just told the Court, that they would have to exert some effort to attempt to determine whether or not all of the relevant documents would be produced in this case, if they did their search and attempt to segregate.

[25] Obviously, there should be no segregation. They have these documents, not only compiled already, but they have them Bates marked, stamped. They have all of the privileges already taken out of them. They were in a position to make any kinds of objections to any of the documents that they gave, if they wanted to.

The suggestion that they blindly handed over documents, I don't think is credible. But even if it were, if that were their attitude, then we should know that as well. That would be their view with regard to the FTC.

I will point out also, Your Honor, that all of those documents go to the only issue that is in this case. There was a suggestion made in their papers, in the joint submission, there was a suggestion made that there are

issues – there were papers that were given to the FTC with regard to markets, other than those raised by the plaintiff in the case.

There's only one issue in the case. And that is, does the merger violate Section 7. And as the Court, I'm sure, is aware, as certainly these counsel, these distinguished counsel for the defendants are aware, this would not be the first time and is not the first time that certain – certain acts and conduct in certain markets directly affect the other markets. That's why all of the markets are at issue in a merger case.

And if this merger is stopped, because of a violation of Section 7, that competition may be lessened, if it is [26] sufficient to stop the merger on any grounds, that is the only issue that is before the Court.

Now, plaintiffs can make their market, and that goes to the evidence, but that does not lose or leave the issue of whether or not the merger violates the law.

Counsel raised the notion that the documents were extremely confidential. That is irrelevant. The Court just entered the protective order, of course.

Counsel made the argument that the FTC can't disclose the documents. That has nothing to do with us. This Court can order them to do it or not to do it. We're not asking to go – we're not asking the FTC for them and we're not – and we're proceeding the way we're supposed to proceed.

The effort that they made, because the Court hit right on it, is – is, I would respectfully submit, an absurd categorization or an attempt to categorize documents.

If the Court were to look, first of all, at the proposal that is made, which is on page 6, in looking at that proposal it seems like, at first blush, that this may in fact be a lot of the information that the plaintiffs may want. Well, of course, it is, but we want a good deal more.

But what is not seen but what the Court picked up on was that what they're talking about is, they're not talking about all of this kind of information they gave to the FTC.

They're only talking about this kind of information [27] that happens to be in the files of these two latecomers, Mr. Frederickson and Mr. Lowe. And that Mr. Frederickson and Mr. Lowe are latecomers, I want the Court to know, I would respectfully direct the Court's attention to two items.

First, if the Court will go to page 4 you will find, the Court would find that Mr. Frederickson and Mr. Lowe did not assume their positions until – since 2001. It doesn't say which month. Both of them, 2001.

These conversations and these efforts began by the CEOs in 2000, prior to the time that these people even had these positions.

Secondly, if the Court would go to the filing that we have, we made the complete filing of the – of the so-called S-4, that was related to the efforts made with regard to individuals. And this is Exhibit A to the joint submission, Your Honor.

And the Court will note – and this is filed by them, Your Honor, and the Court will note, first of all, in their statement filed with the government, this is their S-4, filed on February 7, 2002, with regard to the background of the

merger. It is important, I would respectfully submit, to understand the chronology that they have set out.

First of all, they begin on the background of the merger, about – and they begin to state that the oil industry has experienced significant consolidation. In other words, [28] beginning, as a beginning statement, they talk about the concentration of the industry.

There is no doubt that that kind of statement must be in the Hart-Scott-Rodino filings that they had initially.

The next paragraph, I'm not going to go paragraph by paragraph yet, but I do want to show the general pattern. You will see that the first contact was by the CEOs, one CEO, with another, in June of 2000.

You will note as it goes on, Your Honor, that each paragraph begins and then it continues to June of 2000, then into 2001, and all of these are the context by the CEOs, and the CEOs with the board of directors and then back to the CEOs again.

Finally, the only time that they start to mention, they only mention Mr. Frederickson and Lowe, is November the 7th, which is on page – it would be, if it please Your Honor, with regard to Exhibit A, although they're not paginated, they're paginated differently, but it would be the one, two, three, four, five, fifth page.

And it's under the designation beginning November 7. A team of managers led by Mr. Frederickson and Mr. Lowe. That is the first time that they're mentioned. And what they are is, they are sometimes referred to as the "runners," or, in other words, these are the folks that are supposed to do the details and put it together.

[29] The agreement has basically already been reached. And the Court – if the Court follows this summary by them, it goes like this: The chief executive officers had meetings first. Then they brought in the board of directors. And then the board of directors told them to continue, the chief executive officers to continue.

Then at a certain stage of the game they brought in the general counsel. And the general counsel, then, started to meet and go over various issues.

Then they wrote a report to the CEOs. The CEOs then took that report, approved of it and then continued their discussions among – between themselves, just the CEOs. And then it wasn't until finally, November 7th, which I believe is approximately 11 days or something like that, 10 to 11 days before the announcement, does Mr. Frederickson and Lowe come into the picture.

Now, the offer by the defendants that, from these two people's files is what they will give, and that that somehow contains what would be fair and reasonable and relevant or may lead to relevant evidence simply does not wash, Your Honor. So that the suggestion by the defendants simply cannot be accepted.

Now, our position is, I think, is relatively simple. Is it not correct, could it not be reasonably correct to assume, by reason of the conduct of these defendants, that [30] every document that they gave to the government, they believed either was relevant or could lead to relevant evidence?

And isn't it reasonable to believe that had they wanted to file an objection, they could have filed an objection, but did not? So that we know that the documents

given to the government were given to the government with regard to a hope by them that their merger would be completed, that the government would take a no action on the – on the merger.

Since they have made that determination, in both the first filing and in the second, why should the Court not accept what they have said and allow the plaintiffs to see it? Why should there be a lesser disclosure to us than there was to the government, as deemed by them to be appropriate, regardless of how many times they may or may not have been asked?

Now, we also have the actual request under Hart-Scott-Rodino. And I believe the Court asked a question about that, but I'm not sure. But the requests are generally – they're supposed to provide the internal – this is under the background information of item 4-C of the Section, Your Honor. This is the Federal Trade Commission, this is Subchapter H, these are the rules and regulations on the premerger notification.

Under Section 4-C requires the submission of documents the commission views as essential to perform preliminary [31] evaluations of mergers or acquisitions adequately. Now, this is the preliminary evaluation.

Internal documents of the parties to an acquisition provide a perspective on matters of antitrust concern that even detailed statistical information is unlikely to yield. In other words, this is the preliminary view.

It also goes on to say, "The agencies have found, from past experience, that the viewpoints of the participants are extremely valuable, 'the viewpoints,' in analyzing the antitrust implications of an acquisition. And have

determined that some of these perceptions are indispensable to the preliminary review envisioned by the Act."

Now, just because, by the way, Your Honor, just because the FTC then asks for additional documents, that doesn't mean that they asked for all of these general documents and then they actually submitted more.

No. The procedure goes, the preliminary – the preliminary disclosures, and then they ask for the additional ones. So it's not like it's a separate part or it's different than the first. The first is simply preliminary. And that's recognized. So the idea that in the first wave they gave all of the relevant documents, again, doesn't wash, because everyone recognizes what that procedure is.

Also, under Section – under the same section, and, again, we're talking about item 4-C, documents analyzing or [32] evaluating a merger generally form the basis of a party's decision to proceed with an acquisition. As such, those documents are highly relevant for review purposes, in light of the agency's congressional mandate.

Again, they even go further and say, a large number of the comments recommended documents containing sensitive financial information or trade secrets, sometimes would be exempt. But this suggestion was rejected. So even the highest kind of confidential document is rejected when you're talking about a merger, because you're talking about two otherwise independent companies becoming one.

So should we receive the entire filings that they made to the Federal Trade Commission? Absolutely we should, if the ruling is made with regard to whether or not it is relevant to the issue or may lead to relevant evidence.

They have decided that, I respectfully submit, for everybody, by giving them to the Federal Trade Commission.

I don't need to count the documents. Apparently they mentioned in their filing that they had 10,000 documents, which I, from other statements that they made, about 3 million documents, I guess that would be about one-third of one percent of the documents that they gave to the FTC that they're willing to give to us.

I think that's all I have on that issue. Although I will say that much of this has to do with, also, the CEOs, [33] because as I mentioned, Your Honor, in the filing with the Federal Trade Commission part of it is, as they state, as part of item 4-C of their request for the background information. And that's what a preliminary is, just basically, background information.

But even on that, they speak in terms of, "the agencies have found from past experience that the viewpoint of the participants are extremely valuable in analyzing the antitrust implications of an acquisition. And have determined that some of these perceptions are indispensable to the preliminary review envisioned by the act."

So I assume that the documents that they gave to the – to the government included documents that they gave to – included documents that were used by the chief executive officers.

And it's those – and the government, itself, certainly a private case, but the government itself recognizes this difference about the perceptions and the viewpoints of the participants. And, obviously, we are not talking about Mr. Frederickson and Mr. Lowe.

I do want to say one other thing, if I might, Your Honor. I would like to – I would like to add, as potential deponents, those who filed the affidavits in support of the motion – in support of their opposition. Now, I don't think – the first was Mr. Merrick, I don't think that we would [34] request a deposition from him. But I do believe that from Mr. Richard Severance, who filed an affidavit, and that is Exhibit D to the opposition by the defendants, and Mr. James, so that those two – those two could be added.

So I'm –

THE COURT: And who was Mr. Severance and who is Mr. James?

MR. ALIOTO: If it please Your Honor, Mr. Severance is designated as – his current position with Conoco, as the president of Downstream North America. Downstream would be all of the activity of the oil company from refining down to retail, Your Honor.

And if it please Your Honor, Mr. James, he is the general manager of finance, exploration and production. And he made reference to certain efficiencies upstream, meaning from the exploration, the production, the transportation, from – and then finally into the terminals and the refineries.

So these are the two kind of components. Now, this is only – I would say, this is only Conoco's. So Phillips' downstream representative, specific downstream and upstream representatives, I don't, at the moment, know who they are.

THE COURT: So these are additional depositions that you would want to do. Has this been discussed at all with the opposition before now?

MR. ALIOTO: Not that I am – I will say, not that I'm [35] aware of; I don't know. But the –

THE COURT: Okay. You haven't discussed it with them.

MR. ALIOTO: – but the only reason that I wanted those is because they – if they are going to be relied on, in whole or in part, in support of the preliminary injunction, then we would – in opposition to the preliminary injunction, then we would – then we would want them.

So let me just conclude by saying this with regard to the documents, Your Honor. This is one – I would respectfully submit that this is one of the situations in which – and it can't be termed harassing or in any way vexing to the defendants, except for the information that the documents may yield, because, again, I point out, they've already done it and it's already ready.

And our people would go in and we would do as we do in all of these cases and go through everything that they would have. They generally have them in one or two rooms. It's about 3 millions documents they said, so maybe two or three, it depends, a warehouse or whatever it is.

We have a reasonable time to go through there. We would mark the documents that we would want. They would see the ones that we would be using.

They could make specific objection at trial with regard to them. But in terms of the discovery itself – and, obviously, you know, we're not going to, and the Court, [36] obviously, will not permit us to put 3 million documents into the record as to so-called, this is the background evidence, but we'll specifically, obviously, mark them and

then they can – then they can raise their objection as a legal objection in terms of evidence at the trial or before the trial, at the pretrial.

Thank you very much, sir.

THE COURT: Ms. Schotland, why don't you address one issue of, why not make all the Hart-Scott-Rodino documents available if we've got a protective order in place and they've already been identified.

MS. SCHOTLAND: Yeah, we'd feel strongly that would be very unreasonable. And it's for five reasons which I'll quickly tick off.

THE COURT: Okay.

MS. SCHOTLAND: First of all, this was a plaintiff who has been determined, has likely, no entitlement to PI relief, because the criteria for TRO relief and PI relief are the same and the irreparable injury lack and the balance of harms and the public interest, the likelihood of success on the merits, particular when irreparable injury was partly informed by laches, how can that have changed in three weeks.

And that should inform the reasonableness of a production that is intended to address a PI hearing only. Judge Holmes knew that the plaintiffs had sought a hearing, on [37] September 11th, for both PI and permanent relief that we opposed that. That's been clear since our status report.

He set the hearing for PI relief only and that informs the scope of discovery.

Now getting into the merits of the Hart-Scott-Rodino filing. It is imperative to understand that, contrary to what Mr. Alioto has represented, a merger applicant has no opportunity to protest to the FTC that documents that it seeks are not relevant. It has no opportunity whatsoever.

Defendants are precluded by statute from closing a merger after defendants certify compliance. They have no right to appeal the FTC's demands, outside of the FTC, we have cited to an article by a former deputy attorney general, Joe Sims, explaining the Hart-Scott process, "The agencies have used the second request process to create a whole new discovery mechanism, unconstrained by the federal rules and for that matter, any other rules, and free of any practical oversight by any neutral arbitrator."

Let me make clear what is the burden on the defendant here. It is a critical burden. It is not a problem whether the documents are Bates stamped. Of course the documents are Bates stamped.

The point is, no defendant in a civil litigation is required to empty his files to a plaintiff and to provide all the information relating to his business, way beyond the scope [38] of the complaint.

There has been no relevance withholding to the FTC. We have had to empty all of our files. It certainly shouldn't be required with respect to a plaintiff who's created expedited timetable by filing his PI motion late in a situation where Judge Holmes has just said that they don't meet any of the four criteria for relief and their standing is dubious.

And it is not possible for the plaintiff that is not a participant in most markets to get all of these documents. If you are in market X, you are not a market participant in markets A-V and W-Z, if I've got my alphabet right, you can't challenge that.

As to the outrageous characterization of Lowe and Frederickson as latecomers, these are the guys that Transaero [sic] chose. They have been with the company for decades, by the way, in responsible position, as is apparent from the public biographies on the website.

By the way, this is a fact that might not have been apparent, these men were involved in the negotiations from the beginning. The SEC disclosure that indicates, you know, as of a certain date they were involved in a meeting, that's because the SEC S-4 disclosure is triggered with respect to meeting participants. That doesn't mean these guys weren't involved in discussions early. But in any event, these are the men who Transeuro has chosen and they're men of – their obvious [39] choices, let's put it that way.

I really think that I've said kind of enough about the document production issue. And with all respect, I would suggest that we might want to move on to the two other issues which are whether the CEOs should be deposed and the fact that we need to decide where we're going to get our discovery of Transeuro. We seem to kind of agree on what the discovery is but the location is at issue.

It seems to me that – that what we've done is a very reasonable proffer under these circumstances.

THE COURT: Let me ask you about these proposed depositions of Mr. Severance and Mr. James, on

the Conoco side, and apparently, some parallel depositions on the Phillips side.

I take it there's been no discussion on that but –

MS. SCHOTLAND: There hasn't been, Your Honor. I haven't had a chance to confer with my client as to whether the efficiencies of it will be presented at the preliminary hearing. However, if they are going to be presented as witnesses at the preliminary hearing, we think that it's reasonable for them to be deposed.

THE COURT: All right. Mr. Wohlgemuth, for Phillips.

MR. WOHLGEMUTH: Yes, Your Honor. If I may make a brief response to plaintiffs' counsel.

A couple of points, initially. And I think this is clear. What we're aiming at on September 11th is not a full [40] trial, even though the plaintiff now is requesting that the full trial be combined with the preliminary injunction.

That's not Judge Holmes' plan. It's not what the intendants intend to move toward. And there has – and Mr. Alioto argues there has – we want all relevant documents. He says, why should there be any lesser production.

And the answer to that is, that it's recognized in the case law and it's recognized, I'm sure, by Judge Holmes in his order, and we hope that Your Honor recognizes that there must be some reasonable limitations.

Mr. Lowe, by way of example, would be the 30(b)(6) designated representative of Phillips in connection with the subject matters relative to the complaint.

The argument that he's a runner is entirely specious for the reasons that Ms. Schotland indicated. He is the person who can best respond to the key areas that are going to be subject of a preliminary injunction hearing.

One possibility that always exists in these depositions is that if the plaintiffs were to determine in connection with the examination of Mr. Lowe and Mr. Frederickson that there were other files, documents or areas of documentation that were specifically relevant to these witness' testimony and to the plaintiffs' complaint, they have – of course, we could work that out on the spot. And if we couldn't work it out on the spot Your Honor could work it out in a [41] telephone call. So that is also a possibility.

One other issue that is – relates to the document production issue is that in conjunction, for example, with the examination of our expert, Professor Kalt, the plaintiff would be entitled to review the documents that Kalt relies upon and that's a critical part of our case, as the plaintiff is aware from the submission of the Kalt materials at the temporary restraining order hearing on the 22nd.

Finally, Your Honor, I want to comment about the issue of what – of areas of the Hart-Scott-Rodino documents that aren't directly relevant here.

Plaintiffs' counsel suggests that it makes no difference what markets are involved. And I want it to be clear, and I think it is – certainly, from the plaintiffs' own filings.

In the joint status report the plaintiff specifically states that its claim is that the effect of this merger may be substantially to lessen competition or tend to create a monopoly in the refining and marketing of petroleum products in the United States, nothing more.

This – it's fundamental that in the antitrust case discovery is limited to the relevant market. That's the plaintiffs' relevant market, that's the market in the complaint, that's the market in the joint status report.

The Hart-Scott-Rodino documents, on the other hand, [42] contain a wide array of information on international operations, exploration and production, light petroleum product terminaling, on and on and on and on. So we're talking about documents that were produced under guidelines that are really well beyond the parameters of the federal rules and certainly without reference to the discrete claims in this case.

Finally, Your Honor, my – Phillips' response to the initial question you posed to Ms. Schotland with respect to, are there other documents out there, my answer to your question is this: Yes, there are, there certainly are other documents that could conceivably be relevant.

But we represent to the – we can represent to the Court that the Lowe documents, on Phillips' standpoint, contain by far all of the key documents and the relevant documents that are part of the presentation to the FTC and relate to the issues presented by this case.

There's no question that those are responsive documents. Not every document, but – but for preliminary injunction purposes and for purposes of us making a representation to this Court about the level of production, it's a responsive production, we believe.

THE COURT: Mr. Wohlgemuth, what about – what, from Phillips' point of view, is in the initial filing with the FTC? Are there documents there that would – because I'm a little concerned that we're just identifying

two person's files and I [43] take your – all representations, as officers of the court, seriously, but would there be documents in that initial filing that could supplement what's in Lowe's file, for example, and yet, not cause a great intrusiveness on Phillips' and Conoco's business?

MR. WOHLGEMUTH: Yes, Your Honor. There could, and those are specifically documents prepared by or for the officers or directors which are unquestionably, core documents that there would be some overlap with Lowe and Frederickson but that would be a supplementary production which would not cause us undue heartburn.

And I certainly could not deny the relevance of those documents as it relates to this inquiry. When you get into the second request that's when you get into the millions of documents that are so far afield and get down the road, would have marginal relevance, Your Honor, even in a trial discovery setting, apart from a preliminary injunction.

THE COURT: Okay.

MR. WOHLGEMUTH: Thank you.

MR. ALIOTO: I think that, you know, it needs to be said, if it please the Court, that first of all, the Court mentioned what kind of production could be made that would not be – would not cause intrusiveness on Conoco and Phillips' business.

The documents are already there. We wouldn't be [44] intruding on anybody's business. We would be looking at evidence. And that evidence would be presented at the trial. So it wouldn't – there's nothing that if the Court – obviously, if the Court found that we are entitled to the entire filing, which we believe we are, we're not intruding

on their evidence – on their business any more than any kind of case like this.

I want to point out to the Court that counsel, obviously, did not answer Your Honor's question, which, you know, was, why would it be unreasonable to provide the whole filing.

And is it the position of these defendants that they gave documents to the government, to the FTC, that they believed or that were not relevant or may lead to relevant evidence? I think that that would be unreasonable to say or to suggest that they did that.

And I want to point out also that many times there are objections to the Federal Trade Commission and to the Department of Justice and to others. And as a matter of fact, there's lawsuits about it and they go – and sometimes they tell the government that they can forget it and they go ahead with their mergers or they attempt to go ahead with their mergers.

They can always fight that. That is an incorrect implication that was made, where the Court might infer that [45] they don't have any rights or any ability to be able to object to what they hand over to the government or what they do with the government.

And then, Your Honor, I want to point this out: Now, we're not interested in a fishing expedition. And it is correct that when you go into a – when you charge in a complaint that you want a merger to be disallowed or prohibit the merger because it may, that's the word, "may" substantially lessen competition, you can in fact pick particular markets, like Mr. Kalt did, where he tried to –

where he tried to pick out different markets as distinguished from the overall merger.

But I would point out to Your Honor that there are issues that, in fact, go beyond the particular market that a particular plaintiff might be in to go to the overall issue of the violation of the law.

I can give you one example. If the Court would go to, again, under the joint submission, and under the S-4 filing by the defendants, which is Exhibit A, and if the Court would go to the ninth page, it says, reasons for the merger.

THE COURT: Uh-huh.

MR. ALIOTO: If the Court would go to the second to last paragraph. Now, in this second to last paragraph they're talking about markets other than gasoline. Here they're talking about midstream natural gas business and certain chemical businesses.

[46] But you will note what they say, that the combined company will also continue Phillips' equity participation in the chemicals and plastics joint venture, Chevron Phillips Chemical Company.

Now, those are issues with regard to chemicals and plastics and it's the joint venture. Those are not – those do not relate to gasoline. But the deciding court, whether it be preliminary injunction or trial, I don't want to get hung up on that one, because we'll say, okay, it's just preliminary injunction, but the deciding court, because it's not a jury trial or it's not a jury issue, has the right to infer from that conduct that a joint venture by Phillips with the other major competitor in the field, Chevron, which is now ChevronTexaco, goes to the issue of concentration and goes

to the likelihood of enhancing prices or at least, not competing with the vigor that otherwise might exist in truly independent companies competing in the life/death struggle against each other.

Now, that kind of evidence, the judge has the entitlement to consider. And we would not – they were the ones who revealed this information, and by the way, this is a part of what they, in fact, quoted in their brief.

I forgot where I was, but it was in their brief where they put the – oh, I think it was in the main brief. But the point of that, is, Your Honor, that this goes to that issue. [47] And so the issue is, ultimately, is the merger in violation of Section 7 and does this kind of information, is it relevant or may it lead to relevant evidence? Of course it may.

If they have a joint venture on chemicals or plastics, does that joint venture include a common marketing scheme with their principal competitor?

And remember, Your Honor, we're going to be showing – I know the Court might not be fully familiar with the facts in this particular case yet but the fact of the matter is, is that by reason of this combination, Conoco and Phillips will become the number one retailer in the United State for gasoline. Second will be Chevron and Texaco.

And the question is, will this combination, could it, may it, may it might possibly, might it enhance prices. And second, by reason of this combination Conoco and Phillips will become the number one refiner in the United States.

And by reason of this combination they'll become the number three energy company in the world. Now the issue that's presented in these cases is concentration and the

lack of competition. And the question is, may lessen competition.

So in that regard, would not information like that be relevant or lead to relevant evidence? And I'll sit down by saying they have not stated to the Court and they have not represented to the Court that anything they gave to the government was either not relevant to the issue of their [48] merger, or could not possibly lead to relevant evidence.

And, therefore, what they have given is exactly what we are entitled to under the law, evidence that is relevant or may lead to relevant evidence.

Thank you.

THE COURT: All right. I think we've exhausted the document issue. And there's really, I think there's three issues and they're somewhat, maybe somewhat interrelated, some of them are that we still need to address.

One is the standing discovery that the defendants want from plaintiff. Where do we stand on production of that – those documents?

MR. ALIOTO: I don't – my understanding is there's not an issue as to that. Mr. Moloney maybe can discuss that.

MR. MOLONEY: We've – there's production that's going on even today, as a matter of fact. I have found out that the documents are going to have to come from London.

And some arrived today and they're sort of in process. Whether they can all arrive by tomorrow, which I think was the date that we talked about producing them is a little bit uncertain to me. But they're in process now. They're arriving as we speak.

And I think – the hope is that they'll all be arrived – have arrived by tomorrow, but, if not, then shortly thereafter.

[49] THE COURT: Now, when you say that there's production going on, is that production to you or is that production –

MR. MOLONEY: To me. I haven't produced them. I just started getting them today myself. I just arrived here in Tulsa yesterday. And I got some documents this morning when I got to the office.

THE COURT: And how long will it be – do you anticipate before you start producing the documentation?

MR. MOLONEY: I can start tomorrow, I think.

THE COURT: Where will that be?

MR. MOLONEY: Wherever they would like. They're here right now but –

MR. WOHLGEMUTH: We'll work it out tomorrow. We'll work it out. That sounds fine.

MR. MOLONEY: – they're coming to Tulsa.

THE COURT: All right, fine. Now, we're moving ahead on that one. There was an issue about making – Transeuro making its witnesses available for deposition in

England or Paris. Have we had any further discussion to resolve that issue?

MR. ALIOTO: Excuse me, Your Honor. There would be two issues. First of all, we do have an affidavit from Mr. Moloney who spoke to the client, and the issue that the – the problem with the client is that they're – at the moment, they're in the midst of this contract bidding and apparently [50] it's a United Nations contract and it involves these moves in Afghanistan and Kosovo and other countries under the United Nations situation.

Apparently, he's supposed to be there for all of this activity. Nonetheless, I do not want this to be an issue. So if – if London is inconvenient in this short situation or Paris, then I assume New York is okay. I suppose that we would do that. But I don't want this to be an issue, Judge, so –

THE COURT: All right. Ms. Schotland.

MS. SCHOTLAND: May I – excuse me.

THE COURT: Sure.

MS. SCHOTLAND: New York would be excellent. Our problem was not with the expense of the time of travel, it was the issue of the Hague Evidence Convention –

THE COURT: Right.

MS. SCHOTLAND: – precluding our taking a deposition. New York would be convenient and we're pleased to accommodate that. We also need the deposition – again, I think we have no dispute about that with respect to the fellow in Houston?

MR. BRAMAN: Correct, we're working –

MR. MOLONEY: Yeah.

MS. SCHOTLAND: And we need that promptly, we need that standing discovery that we've been seeking since May, promptly.

THE COURT: Okay.

[51] MR. BRAMAN: We all need everything –

THE COURT: And what deposition is it in Houston? Whose –

MS. SCHOTLAND: This is the –

MR. BRAMAN: Barry Schick.

MS. SCHOTLAND: Barry Schick is – they'll have to describe who knows what, but we've asked for standing with respect to gasoline purchases, locations, service stations, etcetera, if any, as well as, of course, information on their revenues. And that's something that I want to be very sure that we're going to be getting that and we'll certainly accommodate location.

THE COURT: Okay.

MR. MOLONEY: I'd just state, I think it may be based on my discussions with Mr. Grace, who's actually in London, is still the best source of information about the United States operations, but we can discuss that with counsel.

THE COURT: All right. As long as you two can work that out on that deposition or whatever deposition needs to be taken there gets done, and that's fine.

So the remaining issue has to do with the depositions of the CEOs. Now, I've already pretty much heard from

Mr. Alioto on that score. I've read your papers on it. Is there anything else you want to add on the CEO depositions?

MS. SCHOTLAND: No, Your Honor. If you read the [52] papers on it you know how rare it would be to start at the apex. Or he's already getting people close to that apex, but at the pinnacle.

Thank you.

MR. BRAMAN: Your Honor, we just filed a one-page brief this morning that addresses the CEO depositions.

THE COURT: And I've – I've seen that. And I'll – I haven't had a full chance to review it but I will. Is there anything else that we need to discuss today?

MR. WOHLGEMUTH: Yes. Oh, I'm sorry.

THE COURT: Go ahead.

MR. WOHLGEMUTH: Your Honor, just a point of clarification. In responding to your question about the Phillips position relating to the potential production of the initial Hart-Scott-Rodino. And I indicated that that would be a source of relevant information.

I was implicitly folding into my remarks what Ms. Schotland had stated earlier, that in that production, if the Court were to order that as part of its discovery order we would want the opportunity to redact, because there are some very specific things in there, for example, other markets, other potential business transactions, sensitive executive employment issues and personnel issues that

really have nothing to do with the case at all. And we could do that promptly.

THE COURT: Okay.

[53] MR. ALIOTO: Excuse me, Your Honor. Plainly, we would object to any kind of redaction of any document that was given to the Federal Trade Commission. And we would have no idea as to how to base what the redaction was based on.

And I will point out specifically that in these cases, when the chief executive officers organize and commence these conversations and efforts to – to consummate a merger, their particular pay packages have been used with regard to a bias by the witness in the – when they're called to testify and that the Court has the right to consider that.

And if there's other markets that they're talking about that they were looking into, I have no idea what they're talking about, but obviously they were relevant to – they didn't redact them for the Federal Trade Commission, there should be no redaction whatsoever.

Thank you.

THE COURT: All right. On the – all set? All right. What I'm going to do – it appears to me after looking through your briefs and hearing your arguments today that the primary task for the Court today is to get you folks moving down the road to put on your case for preliminary injunction.

And I don't believe that that's going to be a full blown trial on the merits. I think – I don't think that's what Judge Holmes intended.

I'm taking a consideration here that the result of the [54] hearing on the TRO was that the Court there found that the plaintiffs – the plaintiff had not met the criteria for a TRO. And although that doesn't conclude, obviously, the question on the appropriateness or your entitlement to a preliminary injunction, I think it does indicate and the Court can take into account that there should be some reasonable limit that would be appropriate that would enable the parties to prepare for that injunction without unduly running up costs at this early date and being unnecessarily intrusive for all parties.

So what I would intend is this: As far as document discovery, I think that the documents from the Frederick and Lowe files have been offered. And that's fine. I think also the initial Hart-Scott-Rodino documents with appropriate redaction, should be turned over so that plaintiffs can prepare for the PI hearing.

As far as the depositions go, you have scheduled the depositions of Frederick and Lowe. You're scheduling the depositions of the experts. I'm not going to permit the depositions of the CEOs at this point.

I think the case law that I've reviewed is persuasive to me that we don't start at this phase of the game with depositions of the chief executive officers, that there are other people that were involved in this transaction that can speak to that matter.

As Mr. Wohlgemuth has pointed out, Lowe would be the [55] 30(b)(6) witness for Phillips, with respect to the allegations contained in the complaint.

So I think it's appropriate that we start with the Frederickson and Lowe depositions and then you've also

mentioned these depositions of upstream and downstream folks. I'm going to leave that to you to be worked out if that can be filled in there along with these expert depositions and the depositions that the defendants want to take.

The depositions, as I understand it now, of the defendant – of the plaintiffs' witnesses will be in New York City, so we've resolved that.

The standing documentation is to be produced as soon as possible. And the deposition of Mr. Shook, was that the name, in Houston, is to be done expeditiously so the defendants can prepare as well for the preliminary injunction hearing. And then depending on the result of that session, then maybe we'll in further contact to determine where we'll go from there.

MR. BRAMAN: Can I ask just a couple of clarifications, Your Honor?

THE COURT: All Right.

MR. BRAMAN: On the production of the initial Hart-Scott-Rodino filing, we may have that in the same format as presented to the government, just to make our review of it easier as opposed to any different shuffling, and we need to [56] know where the location is where we can send our people to go look at those documents.

And secondly, in light of how you've split the baby between the initial filing and the second request, if we may also ask for production, at this point, of the second request itself from the government so we can see what topics they asked for further information on.

There has been no representation here by defendants other than to say that the second request has every document in their file. That the second request didn't go directly to the kind of markets we're looking at.

MS. SCHOTLAND: I can – I've been hit with sort of three questions, and one of which I'm going to need a few minutes to consult.

THE COURT: Okay.

MS. SCHOTLAND: Let me again state what I thought I stated with respect to the depositions of the efficiency experts. If we use them at the PI hearing we should produce them, makes no sense otherwise. And we just haven't –

THE COURT: That makes sense to me.

MS. SCHOTLAND: – this is the first we've heard of that, and we haven't had a chance to confer.

THE COURT: Okay. If either they're going to testify or their affidavits are going to be submitted to the court, I think that then, in either event, then they would be ripe for a [57] deposition.

But if they're not going – if the testimony is not going to be used then I don't think we need to go there.

MR. BRAMAN: When will we be advised?

MS. SCHOTLAND: Concur – excuse me.

MR. BRAMAN: When will you advise us?

MS. SCHOTLAND: Within the week.

THE COURT: All right. Why don't we say that within a week each side will let the other know who their – can you let each side know who your witnesses are going to be at the preliminary injunction hearing?

MS. SCHOTLAND: Yes, Your Honor.

THE COURT: Okay. Why don't we do that so that if there's somebody on that list then maybe that would necessitate another deposition.

MS. SCHOTLAND: Your Honor, with respect to whether we will provide the initial Hart-Scott-Rodino filing, subject to redaction in the form in which we've provided to the government, the answer is, yes.

THE COURT: Okay.

MS. SCHOTLAND: With respect to the third question related to the specs, I have to apologize to the Court, I need to consult one moment with the brains.

THE COURT: Okay, that's fine.

MS. SCHOTLAND: Thank you.

[58] Excuse me. I'm going to have to – with Your Honor's permission, I think if Mr. Byrne, who has more information relevant to that specific question could address the Court, that would be helpful.

THE COURT: Okay.

MS. SCHOTLAND: It would be more expeditious, I think, to the Court.

MR. BYRNE: Your Honor, with respect to whether or not the second request covers product areas

and product markets outside of those alleged by the plaintiffs, yes, we can represent to you that it does.

There were a number of product markets and product areas, gathering of natural gas, for example, that are covered by the second request, that it is broad in scope in terms of the products and markets beyond those alleged in the plaintiffs' complaint.

I think that was a question that we were posed.

THE COURT: Is there a problem with you producing that second request?

MS. SCHOTLAND: He means the specs, Brian.

THE COURT: Correct. Whatever – what their request was, what their second request was, does that –

MR. BYRNE: Certainly, I think that we'd be comfortable producing at least the portions of it that pertain to these particular product markets. I wouldn't think it would [59] be necessary, I would hope, to produce any questions directly related to other product markets or even, you know, the identification or definitions as to what the other product markets are, if that's acceptable.

MR. BRAMAN: Your Honor, there's no burden here. It's a letter from the government, and it just says what the government thinks they need after they have looked at what you have allowed us to look at. And we just need to see the same kind of questions. Then we may or may not ask for more information. It depends on what the second request is.

MR. BYRNE: May we have a moment to confer, Your Honor?

THE COURT: Sure.

MR. BRAMAN: The other question was location –

MS. SCHOTLAND: Yes. Your Honor, I think it may take more than a few minutes. It may take 5 or 10 minutes to confer on this. Is – could we be allowed a 5 or 10 minute recess to do this?

THE COURT: Yeah, why don't we take a short recess and see if you can determine one, the location of the Hart-Scott-Rodino production and then also –

MS. SCHOTLAND: We will accommodate on the Hart-Scott-Rodino production.

THE COURT: All right. With that, why don't we take – why don't we take a 10 minute recess and then we'll [60] reconvene.

MS. SCHOTLAND: Thank you, Your Honor.

(Recess)

THE COURT: All right. Following our brief recess have we managed to resolve the last two issues here?

MR. WOHLGEMUTH: Your Honor, with respect to the issue of the provision of redacted first production HSR documents, I indicated to Mr. Braman that we could commit to having those documents available in Washington. The earliest date would be this Saturday, which would give us enough time to review and redact. Or they could be put on a plane Saturday. And I think we could work that out.

THE COURT: Okay.

MR. WOHLGEMUTH: That should be sufficient time for the depositions.

The second issue with respect to this HSR request, we are – we don't think it would be appropriate to provide that document, which is about 70 pages and contains largely irrelevant information from the FTC to the plaintiff. However, we would be willing, hopefully, by this afternoon, to provide it to Your Honor to make that determination, in camera, with respect to whether that pushes the ball forward at all.

We don't think it does in any way other than maybe to – for the plaintiffs' use in trying to proceed with further discovery hearings of some type.

[61] THE COURT: Okay.

MR. ALIOTO: Your Honor.

MR. WOHLGEMUTH: We don't – and I'm sorry. Just as a – by way of – sorry, Mr. Alioto. I just want to mention, I don't have the document with me and we don't have it in Tulsa. We could obtain it and submit it, in camera, this afternoon.

MR. ALIOTO: May it please Your Honor. I respectfully submit that it is or should be totally unacceptable that we have to wait for these documents until Saturday, so that they can determine what they think is relevant and redact what they think they ought to redact.

I would like the Court, and respectfully submit that the Court should reconsider that ruling. I understand that they could – we could have that production today or tomorrow. We need this time if the hearing is on the 11th.

By making us wait until Saturday, that is not right, we would say, we would respectfully submit, it's not fair. And it's certainly not correct, we would submit to Your Honor, that they would have – be allowed to have a free wheeling opportunity to redact or to make the determination of relevancy and redact what they want.

We would ask that the Court – we have a protective order, Your Honor. Why do we have it? If there is something in those documents that they don't like or they want to make, the Court said at the beginning of the session that they could [62] – they could designate any of them as confidential in good faith.

The Court could put any kind of rules on us that the Court wanted to put on us and we could get the documents right away. And of course we would honor any ruling, obviously, that the Court made. But to allow them to redact and to wait until Saturday is not fair, Your Honor.

THE COURT: Ms. Schotland.

MS. SCHOTLAND: Well, I think Your Honor has already ruled that the documents could be redacted. We're a little insulted by the thought that we would redact on any other basis and would be stated in the preamble to the production and would be appropriate.

But these are – include some very highly confidential and totally irrelevant documents as to future transactions, personnel evaluations and information that really is – is – has no moment with respect to the markets pled or the subject matter of this complaint.

And I don't know how much more, how much harder we can cause people to work. I mean, we've had our competent people working all last weekend in terms of

what we have provided. We will have our people working with respect to something that we had not planned to produce, as soon as we can get a cell phone call to them outside the building. But there just is a limit as to how quickly we can go through several thousand documents [63] and do right by our client.

THE COURT: All right. I'm going to stick with my original ruling here that production be in Washington on Saturday. That's what we've – the defendants here have said is possible.

Both sides have been waiting, I think, for documents in this case. And I will receive the second request, in camera, to review and we'll make a decision on that as soon as possible, as to whether or not that will be produced to the plaintiffs in the case.

All right? Anything else? Yes.

MR. BRAMAN: I hope this isn't pushing the limit, Your Honor, but as long as you've allowed them to wait until Saturday to produce, could we have them shipped to Minneapolis on Saturday instead, so that they arrive in Minneapolis on Saturday.

MS. SCHOTLAND: What? It isn't that we don't want to do that. I'm afraid that they will not be completed until Saturday. Now, if there is, I believe that the Federal Express does go out Saturday afternoon. I'm now looking to the brawn as well as the brains.

UNIDENTIFIED SPEAKER: Because we'll get it on Monday.

MR. BRAMAN: No, no, we'll be there Saturday, because we're not waiting until Monday for these documents. My question was, could you get them to our office in Minneapolis [64] on Saturday.

MS. SCHOTLAND: I would say, Your Honor, you know, that an attempt can be made. We're not going to delay them for the sake of delaying them. I just don't know how quickly that can be gone through.

THE COURT: Can you even produce them, if need be, in phases, if need be?

MS. SCHOTLAND: Well, by the way, I don't know why they can't send somebody to Washington on Saturday, if we make them available.

MR. BRAMAN: No, that's –

MS. SCHOTLAND: Just a moment. Your Honor, if I may. May I just confer?

THE COURT: Yes.

MS. SCHOTLAND: I'm reminded that planes fly Saturday afternoon and if we have a – if we can put it on the later flight Saturday afternoon to Minneapolis, we would be pleased to do that, and we'll have somebody accompany it.

MR. BRAMAN: We'll work that out.

THE COURT: Okay. So the documents will be flown to Minneapolis on Saturday and I'll receive the FTC's second request in camera, and take a look at that this afternoon.

All right, is there anything else?

MR. ALIOTO: Yes, Your Honor. If it please the Court, I would like to make a motion for reconsideration of the [65] Court's order with regard to – and I would like to treat the last effort with regard to the redaction as a motion for reconsideration.

But I would also like to move the Court for reconsideration of the order with regard to the depositions of the chief executive officers.

I would make two points of this on this issue, Your Honor. First, I think that it is recognized, certainly in antitrust litigation and as stated by the FTC, and they stated it in terms of past experience, and what they found from past experience.

Plainly, the people who made these decisions are the two chairmen or the two chief executive officers. Attached as Exhibit A, I made reference to this before. I want to point out that attached as Exhibit A is the S-4 filing by the defendants.

That filing starts that in June, 2000, Mr. Dunham called Mr. Mulva, the two CEOs of the company. It notes that there were – obviously, Mr. Frederickson or Mr. Lowe were not involved, it notes that there were "several meetings and discussions ensued during the entire summer of 2000." Again, neither Mr. Frederickson nor Mr. Lowe were present.

Mr. Dunham was supposed to have proposed terms with respect to valuations and other items, and what they would be jointly responsible for certain efforts. Again, Mr. [66] Frederickson and Mr. Lowe were not present.

THE COURT: Mr. Alioto, let me interrupt you. Because a motion for reconsideration I don't think is

appropriate, because one of our federal judges noted once before that we're not just hitting fungoes up here when we – taking a few practice swings.

I've made a ruling on that and you can appeal that if you like. I understand your position and all I'm saying at this point is, you haven't made a case out for jumping to the depositions of the CEOs at this stage of the game.

It's been indicated, at least by Phillips, that Mr. Lowe would be their 30(b)(6) witness on the allegations in the complaint. And I think that it's appropriate in the interest of judicial economy as well as cost saving for everybody in this litigation, to at least start at that level and see whether or not any additional deposition testimony is necessary.

If, in fact, you lay the foundation for that, then we'll reexamine it. But at this point the Court's made a ruling on that issue, on both of these issues that you're talking about and I think your more appropriate remedy would be to talk to Judge Holmes if you feel you want to do that.

MR. ALIOTO: Okay. Then I appreciate that very much, Your Honor, and okay, then we will try to file an appeal this afternoon, first thing.

[67] I'm only doing it because of the time situation and also because of my belief that the chief executive officers ought not to receive this special kind of –

THE COURT: I understand and believe me, you're not hurting my feelings. We're all – we all know what we're doing here. But that's really your more appropriate and –

MR. ALIOTO: Very good, Your Honor. Then we'll file a – we'll file an appeal as soon as we possibly can. And, hopefully, if – if the judge will hear us this afternoon, we will notify everybody.

Thank you.

THE COURT: Well, if there's nothing else, we'll be in recess.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

(Recess)

A TRUE AND CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-STYLED MATTER.

CERTIFIED: _____

Terri Copeland, CSR, RPR, RMR
United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRANSEURO AMERTRANS WORLDWIDE MOVING AND RELOCATIONS LIMITED,	)	
Plaintiff,	)	No. 02-CV-342-H(C)
V.	)	
CONOCO INC., and PHILLIPS PETROLEUM COMPANY,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON AUGUST 27, 2002

HEARING ON APPEAL OF MAGISTRATE'S DISCOVERY ORDER

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

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UNITED STATES COURT REPORTER

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PROCEEDINGS

August 27, 2002

THE COURT: Please be seated. The Court calls the case of Transeuro Amertrans vs. Conoco, et al. Could counsel please identify themselves for the record.

MR. ALIOTO: May it please, Your Honor, Joseph M. Alioto for the plaintiff.

MR. BRAMAN: Richard Braman for the plaintiff as well, Gray, Plant & Mooty.

MR. MOLONEY: Larry Moloney, from the same firm.

MR. BEASLEY: I'm Brad Beasley from Boesche McDermott [3] here in Tulsa, Your Honor.

THE COURT: All right.

MR. WOHLGEMUTH:—Joel Wohlgemuth and Bill O'Connor for Phillips.

MR. WOLTZ: Joseph Woltz for the defendant Conoco.

MS. SCHOTLAND: Sara Schotland for defendant Conoco from Cleary Gottlieb in Washington.

MR. BRYNE:—Brian Byrne for defendant Conoco from Cleary Gottlieb in Washington.

THE COURT: All right. This matter comes on pursuant to the request by the plaintiffs for immediate proceeding.

Mr. Alioto, you are recognized in support of your motion, sir.

MR. ALIOTO: Thank you. May it please the Court, there were two particular items of discovery which the plaintiffs had sought. The first was all the documents that had been produced already, copied and Bates numbered by the defendant in its application or in its submission to the Federal Trade Commission with the hope that the Federal Trade Commission would take no action against its proposed merger.

Each of those documents, we would respectfully submit by their very production, were either relevant or believed to be of such a nature as to lead to relevant evidence which would be the standard of relevance, of course, in our case.

We respectfully submit that we would be entitled to [4] view those documents. If after viewing those documents there are any documents that we pick out, because certainly there are reputed to be more than three million, I don't know how many boxes I assume a couple of – maybe even a warehouse, I don't know, but I know that what the plan is, is to give us two or three boxes. We would respectfully submit that if we were given the opportunity to view them and then to select those that we believed would be relevant for the hearing on the 11th, that if at that time there was any view that any of those documents that we had selected were in any way either not relevant or not – or could not or would not lead to relevant evidence, that they could so state and they would state it in an atmosphere in which at least we were given the opportunity to view the documents that they gave to the FTC. It's not like we're asking for a blanket request as if we were starting from scratch, or if there would be any burden for them, there would be none, but instead we are asking for the very documents that they themselves obviously believed

that they thought would support their position with the FTC or that the FTC thought was either relevant or could lead to relevant evidence. They had a choice, of course. They didn't have to give any documents to the FTC. Of course, that might mean that the FTC might not look favorably on such a situation, but there have been those kind of cases which defendants have taken that position and have required the FTC to proceed.

[5] In light of that conduct by them, and the fact that there would be no burden to them, and that they have already been produced, and also if it please Your Honor, that we have a protective order, the Court entered the protective order this morning –

THE COURT: Let me ask you this, sir. And you're appealing from the decision of the magistrate judge –

MR. ALIOTO: Yes, sir.

THE COURT: – in what way, sir?

MR. ALIOTO: Pardon me?

THE COURT: In what way?

MR. ALIOTO: I am very sorry, I thought that that was stated. I assumed that. I apologize, Your Honor. With regard to the documents, there were –

THE COURT: Well, I'm trying to get to the main event here. Right?

MR. ALIOTO: Yes, sir, I'm sorry. There were – the defendants were claiming that there were two events. There is a preliminary production and then there's so-called secondary. Preliminary production is the first general preliminary look that the FTC seeks to have and

it's usually in a more general frame or stated more generally, although they do try to see if they can ascertain from that first production what basically is going on. The second or additional request is the second one. The second and additional one, there was a production at that [6] time as well. So in general, from what we understand from the defendants' documents, there were basically two productions.

The magistrate ordered that the – as I understand it, that the first production could be made. However, the defendants also asked to be able to redact certain portions of those documents, and the magistrate judge allowed them to be able to make that determination and decision before they gave the documents to us. By reason of the redaction and what would be necessary in order to redact them, whatever it was or whatever it is that they would redact, we then were told that it would take some time and that we wouldn't get the documents until Saturday.

We appealed from that on the ground that, first of all, we should certainly not be limited to the preliminary production. Secondly, under no circumstances should the defendants be allowed to redact, especially on their own, any material from what they have already produced to the FTC. Third, any redaction is already covered by the fact that there is a protective order so that there would be no need for redaction. Fourth, so far as I know, the only time that redaction would ever be allowed is either at a specific trade secret or privilege, some privileged communication or something like that, which I understand is not being claimed on either one of them.

So our first position is, one, we should not be [7] limited to the preliminary offering; and two, we should not – there should be no redaction.

We would submit, and obviously be under any order of the Court that after – it would take us probably two or three days to go over all of the documents. When we chose the documents, if there is any problem with any of those documents that we have at that time they can either claim them to be confidential or privileged or any position that they want, but we think that whatever the FTC received we should receive as well. We think that that is the relevant or lead to relevant evidence criteria, and it's already been established, and they've already done it.

The second point are the depositions, Your Honor. Should I go through both points?

THE COURT: Please.

MR. ALIOTO: The second point are the depositions. The magistrate ruled, as Exhibit A to our appeal that we filed Your Honor, the Court will note that Exhibit A is designated as the ConocoPhillips filed S-4/A that was filed on February 7th, 2002. It is one of the SEC filings.

Directing the Court's attention to the very first page of that Exhibit A and the last paragraph beginning in June 2000, from that page forward the Court will see that it designates and specifically states the number of meetings between the chief executive officers. After many pages and [8] going for, beginning in June of 2000 and going all the way to November of 2001, at that time there was a secondary group that then took over to work out, as I understand it, the details of the situation, and that there was some changing, it was something to do with financing,

financing and accounting principles. And that is shown, if it please Your Honor, on it would be – these pages are not – they are not paginated, Your Honor, but it would be the – it would be one – the fifth page. On the fifth page, the fourth full paragraph that begins quote, "Beginning November 7 . . . " That refers to a team of Conoco managers and Phillips managers that met to work out certain details which they describe as they met in New York and discussed financial, quote "financial and accounting issues and potential synergies arising from combining the two companies."

We listed in our request for depositions these two people who headed these groups, Mr. Frederickson and Mr. Lowe. However – we did it because they were in this S-4 filing. However, the magistrate ruled we that we must take these folks' deposition and that as of now we are not entitled to take the depositions of the chief executive officers, and that somehow whatever testimony is given by Mr. Lowe or Mr. Frederickson is somehow going to lead us to the chief executives. Now, this is a case in which this S-4 shows such great involvement in just the two CEOs that it cries out, I would respectfully submit, to allow us to take these depositions. Again, starting on Page 1, [9] it not only shows that Mr. Dunham, the chairman and the CEO of Conoco, contacted Mr. Mulva to start this off, but it then follows by saying that there were several meetings and discussions just between these two during the entirety of the summer of 2000. These talks fell off for awhile, and there's a reason why that happened, but then they were brought back up again, and you start on it, it would be Page 3. And in September of the next year again the board authorizes Mr. Mulva to continue the discussions. He in fact contacts Mr. Dunham. It showed that they meet in

Oklahoma City, it shows that they meet at Houston, it shows that they are on the telephone time after time. It goes by the dates, it sets the dates out. September 10, September 28, October 8, October 8, October 11, so forth, October 16. These are all about these two individuals and it goes all the way past November 1 to November 4, November 6. Finally, after that they hand it over to this other group.

Now, these two people even – we even pointed out to the – which we also attached as Exhibit B to our appeal, Your Honor. And this would be found if the Court looked at our filing on the appeal and if the Court went to what is marked as page number 168 on the bottom of the page, it's about the second to last page of the attachment Your Honor, it is the second – it is the very last page other than the signature page. And if the Court would look under – this is what [10] the – this is what the FTC does, and under the background information to item 4(c), in the first full paragraph about the third sentence beginning "The agencies have found from past experience . . ."

In that document this is what the agency says: That "The agencies have found from past experience that the viewpoints of the participants are extremely valuable in analyzing the antitrust implications of an acquisition and have determined that some of these perceptions are indispensable to the preliminary review."

Now, in addition to the FTC from its own experience of finding this out to be so, obviously in antitrust litigation it's always the chief executive officers are generally the people, not only as the case at law that we pointed out to the Court in our supplemental pleading, are not only the ones who have the final say, but generally they are

involved in this major issues. And in this case we have an actual designation by them of the involvement, and it is just those two. And for example, when it talks about their board of directors it's only what the board of directors get as oral reports, apparently, by these two, about all of their meetings and about all of their conversations on the telephone. Our submission is, is that we could probably, and it was initially as a matter of fact, we felt that the only discovery we would really probably need would be the chief executive officers and Hart-Scott-Rodino [11] filings and that's really all. Now, Hart-Scott-Rodino may yield names of other people, but at the moment we don't see that. And we named this Mr. Lowe and Mr. Frederickson only because they were the only one else named on number four. And we also suggested this had morning that if someone was going to file an affidavit or going to be present to give testimony at the hearing we would also like to know that, and I believe counsel agreed to that. So for example there was one affidavit of the downstream person that was submitted in the prior arguments in front of Your Honor and we would probably want that.

But our appeal is this, Your Honor. We represented we would take the depositions of these CEOs one day, perhaps two, I doubt it. There's no harassment here, there's no attempt to vex anyone. These are filings that have been already done and these are the men who put this together. Either their intentions and their motives and their discussions, which by the way included statements, I think we put it in our pleading, but I believe that they – included in their discussions were the visions and strategies of their companies which is not a – individual companies, which is not the kind of thing, I would submit right there, that

ordinarily people would state that that's what they were talking about.

But our appeal and our request is that it does save judicial time, it will be quick, it goes to the heart of the [12] matter, it doesn't entail extra discovery as the magistrate, I believe, have put us in the situation. It's certainly the fairest way to get the kind of evidence that would be presented to Your Honor on September 11th. The Court must hear, I would submit respectfully, submit must hear the testimony of Mr. Mulva and Mr. Dunham. The Court must hear why they were getting together, why they were meeting, what they were talking about, either on the phone or in person, what documents they were using, the reports that they were making to their own board of directors. This is where the fundamental part of the case is, and to be deprived of those depositions is to cut – is to cut out the entire case, and we would submit that that would be unfair. Thank you.

THE COURT: Ms. Schotland, you are recognized.

MR. WOHLGEMUTH: May I speak first, Your Honor?

THE COURT: Ms. Schotland, you are recognized.

MS. SCHOTLAND: Yes, Your Honor. Your Honor, I would like to just begin by citing to the very stringent standard that would be needed to overturn the magistrate's decision this morning. Of course they certainly have a right to appeal that, but Your Honor is aware under Rule 72 the stringent standard, of course. The magistrate, I guess, spent a couple of hours and listened to

all of these arguments this morning. I thought if it's agreeable to the Court I would begin first with the CEO issue and then turn to the document issue very quickly, not to [13] reprise the entire discussion. Defendants agreed to produce two very senior officers, Frederickson and Lowe, who were designated by the Transeuro. These men were involved in the negotiations leading up to the merger and they would have been 30(b)(6) witnesses with respect to those negotiations. One shouldn't simply look at the S-4 filing as to who was involved in the meetings and conclude that they weren't involved until the late stage. On the contrary, Frederickson and Lowe were involved since the beginning. Frederickson and Lowe, also their participation as well as the participation – excuse me, as well as the participation of the CEOs, was first disclosed in Conoco's S-4 filing in February 2002. So there's quite a bit of time when, had the plaintiffs wanted to press this, they could have.

Now, Your Honor, the magistrate did not rule that under no circumstance will Transeuro be entitled to depose the CEOs, rather the magistrate ruled very logically, and relying on some cases, I believe that we had cited in our discovery plan, including a Tenth Circuit case, that before the CEO of a company is deposed one starts lower down the chain. And that was – those citations were in our discovery plan and we think that's the way to proceed. We do not – the magistrate did not rule and we do not contend that there's no circumstance ever in which those CEO depositions would be necessary. It's merely since Frederickson and Lowe were identified by [14] Transeuro, they have very senior positions in the company and would have been the 30(b)(6) witnesses for Conoco and Phillips with respect to these negotiations and were fully

involved in all aspects of the transaction, they should be deposed. And that's a very logical ruling, it seems to me, on the part of the magistrate.

With respect – shall I then turn to the documents, Your Honor?

THE COURT: If you would, please.

MS. SCHOTLAND: Yes. With respect to the document, the nature of the Hart-Scott-Rodino process is that merger applicants are required to turn over the kitchen sink, empty their file drawers on all aspects of their business and the transaction to obtain approval. And this is not like civil discovery. There is no opportunity for merger applicants to say FTC, we do not think that those documents that you are requesting are relevant, we think that they're overbroad. To the contrary, the merger applicant is required under the statute, if it wants to get this clearance, to turn over the documents requested by the FTC and has no appeal outside of the FTC. One of the former attorney generals, assistant attorney generals for antitrust Mr. Simms, Joe Simms wrote an article that we cited in our discovery approach, in which we pointed out that the Hart-Scott-Rodino discovery, contrary to what Mr. Alioto represented, has nothing to do with the Federal Rules of [15] Civil Procedure and is not, the criterion is not relevant or likely to lead to relevant evidence. The merger applicant has to turn over what the FTC requests.

Now, the key point is that the FTC request goes way beyond the scope of the Transeuro complaint. Documents are not conveniently organized by gasoline or crude oil refining. They say we want all documents related to competition, we want all documents related to market

forces, all documents related to market share, all documents related to entry, and you produce those records by custodian. So there has not been any screen even of relevance to the transaction because we've turned them all over, much less, and this is – this is the core, much less relevant to the markets pled by Transeuro in their complaint. The FTC production goes to all aspects of these two companies' business and goes way beyond that. It would be the equivalent of requiring that we empty our file drawers which of course in civil discovery is not required.

Now, let me go back to what the – and I'm sure Your Honor, just to remember the posture we're in, even in an ordinary civil suit a defendant is not told within 10 days you have to produce three million documents and we're not going to be specific as to what documents we want, you've to turn over everything, even that goes beyond the relevance to the complaint. But here in the context of a PI hearing where one would assume that the discovery would be more limited because [16] we're not talking about the final hearing on the merits because Your Honor has already ruled that this plaintiff has doubtful standing and doesn't meet the TRO criteria which are, of course, the same as the PI criteria, it would seem that the discovery should be reasonable.

Now, let me go to what precisely the magistrate ruled. The magistrate first said, yes, we have to promptly turn over the documents of these two senior officers, Frederickson and Lowe, which are core documents related to competition and the relevant markets and to the transaction which we represent will give plaintiffs and their economic expert a great deal to work with.

The magistrate required us to go further than we had proposed or requested. The magistrate required that we turn over – again, the defendants' position might have been that no amount of discovery was appropriate, but magistrate said, look, not only do you have to turn over Lowe and Frederickson, you have to turn over the initial Hart-Scott-Rodino request. And that initial Hart-Scott-Rodino request 4(c), I think that the – there's a very good summary of it, ironically, on Page 168 of what the plaintiff has just provided to you. It requires the submission of documents, I'm quoting background information to 4(c). And 4(c) is also synonymous with initial request. "4(c) requires the submission of documents that the Commission views as essential to perform preliminary [17] evaluations of mergers or acquisitions adequately. Internal documents of the parties to an acquisition provide a perspective on matters of antitrust concern that even detailed statistical information is unlikely to yield."

And I could go on, but basically what I'm trying to say is that under 4(c), the initial request that the magistrate required that we turn over, an officer of the company must certify under oath that all documents meeting these criteria are provided regardless of where in the company they may be located. All files have to be searched for quote, "all studies, surveys, analysis and reports prepared by or for an officer or director that analyzed the transaction with respect to competition, competitors, markets, market share, potential for sales growth or entry into the new product or geographic markets and these criteria deemed sufficient by the DOJ and the FTC for their initial review."

And this is what the magistrate required us to submit in addition to what we had initially proffered.

The magistrate did allow us to do some redaction because we said that this included, we represented that this included some extremely confidential information with respect to some future transactions irrelevant to the scope of the complaint as well as very sensitive personnel evaluations involved in this merger, for example, of senior officers.

Now, Mr. Alioto –

[18] THE COURT: What is the principled basis for the redactions?

MS. SCHOTLAND: Excuse me. That highly confidential business information and the irrelevance to any aspect of the Transeuro complaint. Now, it would be our proposal, Your Honor, lest there be any, any question about the scope of these redactions, to provide a redaction log, just as one provides, you know, a privileged log in a typical situation. We would also be very prepared to provide for the inspection of the magistrate judge in-camera the redacted and unredacted version so that while plaintiff's counsel would have the benefit of the log explaining the reason for the redaction, both the redacted and unredacted could be provided to Magistrate Judge Cleary.

And I emphasize to Your Honor that this is very limited, Your Honor's time is. It's being taken as if there were going to be huge redactions. These redactions – I can't say because the magistrate just ordered us to do this this morning, this is not something that we had wanted to do. We haven't had the legions go through it yet, although we placed a cell call right after the magistrate's ruling and they are beginning on it, but that we believe that it's a

thimbleful, it's not that there's a huge amount of redaction that is being proposed. In any event, the propriety of the redactions would be able to be checked by virtue of the description to the plaintiffs and the disclosure to Magistrate Garber [sic], [19] should he wish to review the reductions in-camera.

Your Honor, this is quite an extraordinary situation here where what we have is a situation where the magistrate had, I thought, teed it up quite well this morning. He said, look, I don't want to go over – I don't think he used the phrase, it's my phrase, "who shot John" with respect to everything that that's gone in discovery here, but what I want to do, and I think this is quote – the transcript won't be available til tomorrow morning – he said I want to get discovery rolling that will be needed for the preliminary as of September 11th. And I think that's the right standard.

We are giving this plaintiff in the context where it's lost the TRO, and it's standing is dubious, an enormous amount of information. And we think that for them to assume, when they haven't seen these documents, these thousands of documents that we're going to be providing, it is unreasonable – or to the contrary we believe what we are proffering is reasonable, it is both – and what the magistrate ordered is reasonable. It is both the files of Frederickson and Lowe, the 30(b)(6) deponents who were intimately involved with these negotiations ab initio, and from all files in the company, the initial Hart-Scott-Rodino filing, and let's see whether that isn't – that isn't a sufficient production. We think that the magistrate's ruling was appropriate.

THE COURT: All right. We will hear from Mr. [20] Wohlgemuth.

MR. WOHLGEMUTH: Thank you, Your Honor. I would just follow up on Ms. Schotland's statement by saying that what Magistrate Cleary ultimately did, and it will be reflected in his order, I am sure, is established a comprehensive, a comprehensive schedule for discovery prior to preliminary injunction. Not only are the parties going to be making significant document disclosures, on our side we're going to have the Lowe and Frederickson documents as well as the first production. And the magistrate also required that we set the expert depositions, which have been done now, and it's recognized that in conjunction with the plaintiff's examination of Dr. Kalt, our expert, there will be document discovery related to that.

THE COURT: Tell me why it is that Mr. Mulva shouldn't sit for a deposition?

MR. WOHLGEMUTH: Your Honor, I think for two reasons. One is at this stage, at this stage which is at the preliminary injunction stage, it's a reasonable limitation, we believe, for the Court to require depositions from the senior officers who were involved in the transaction. And as I was going to mention, that in addition on Phillips' side to Mr. –

THE COURT: Now, is he within the jurisdiction or reach of the Court?

MR. WOHLGEMUTH: Yes, he is. And, in fact, I [21] understand that they were trying to serve a subpoena on him today for the preliminary injunction hearing, but he certainly is, Your Honor. And in addition to Mr. Fred – I'm sorry, Mr. Lowe, it was volunteered and – the fact the plaintiffs desired to take other preliminary injunction witnesses who would be supporting other points for

Phillips at the hearing, and the magistrate ordered that within seven days the parties exchange witness lists so that there would be the free taking of depositions of those witnesses on both sides.

We are taking the expert depositions with related document discovery. And the schedule that's now been set up by the parties and Judge Cleary involves the taking of depositions beginning on September 3rd and running every day next week with some double tracking in order to get ready for the Court's September 11th preliminary injunction hearing.

THE COURT: Anything else Ms. Schotland didn't cover?

MR. WOHLGEMUTH: No, the only other point, she did mention Rule 72(a). I just want to point out that I just did receive the appeal and I noticed that there was no reference to the applicable standard or any interpretation or application of 72(a) in the papers that the plaintiff filed as part of its appeal. Thank you, Your Honor.

THE COURT: All right. The Court has reviewed the matter and finds that under the applicable standard of Rule 72 there's no basis upon which to overturn the rulings of the [22] magistrate at this time. Therefore, the Court declines to do so and the appeal will be denied.

The Court will order that there be a production of a set, matching set of redacted an unredacted documents to Magistrate Judge Cleary, along with a log identifying those documents and those redactions for purposes of easy access so that he can easily determine whether and to what extent the redactions are, and those will be provided presumably by Saturday.

I suspect that our group that's not here today has gotten a good night's sleep and they are working away. Yes, Ms. Schotland?

MS. SCHOTLAND: I hope they are working away.

THE COURT: You did reach them by cell phone, didn't you?

MS. SCHOTLAND: Yes, Your Honor, they told them to.

THE COURT: All right. Anything further at this time, Mr. Alioto?

MR. ALIOTO: No, Your Honor.

THE COURT: Anything further?

MR. WOHLGEMUTH: No, Your Honor. Thank you.

THE COURT: All right. Court is adjourned.

(Recess).

[23] A TRUE AND CORRECT TRANSCRIPT.

CERTIFIED: _____
Glen R. Dorrough
United States Court Reporter

TITLE 15 - COMMERCE AND TRADE - CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

Sec. 18a. Premerger notification and waiting period

(a) Filing

Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if –

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person –

(A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

(B)(i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published); and

(ii)(I) any voting securities or assets of a person engaged in manufacturing

which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;

(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

(III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

(b) Waiting period; publication; voting securities

(1) The waiting period required under subsection (a) of this section shall –

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice

(hereinafter referred to in this section as the "Assistant Attorney General") of –

(i) the completed notification required under subsection (a) of this section,

or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section –

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

(c) Exempt transactions

The following classes of transactions are exempt from the requirements of this section –

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 1467a(e) of title 12, section 1828(c) of title 12, or section 1842 of title 12, except that

a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 1843(k) of title 12; and (B) does not require agency approval under section 1842 of title 12;

(8) transactions which require agency approval under section 1843 of title 12 or section 1464 of title 12, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 1843(k) of title 12; and (B) does not require agency approval under section 1843 of title 12, if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

(d) Commission rules

The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, consistent with the purposes of this section –

(1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may –

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e) Additional information; waiting period extensions

(1)(A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this

section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(B)(i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person to determine –

(I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or

(II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person.

(ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with investigative staff, in order to avoid undue delay of the merger review process.

(iii) Not later than 90 days after the date of the enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall conduct an internal

review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.

(iv) Not later than 120 days after the date of enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.

(v) Not later than 180 days after the date the of [sic] enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress –

(I) which reforms each agency has adopted under this subparagraph;

(II) which steps each has taken to implement such internal reforms; and

(III) the effects of such reforms.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request

is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.

(f) Preliminary injunctions; hearings

If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 18 of this title, or section 45 of this title, or an action is filed by the United States, alleging that a proposed acquisition violates such section 18 of this title, or section 1 or 2 of this title, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.

(g) Civil penalty; compliance; power of court

(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(NOTE: $10,000 changed to $11,000 pursuant to the Debt Collections Improvement Act of 1996, Pub. L. 104-134, Section 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. Section 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. Section 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996))

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court –

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such

notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

(h) Disclosure exemption

Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

(i) Construction with other laws

(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act (15 U.S.C. 1311 et seq.),

the Federal Trade Commission Act (15 U.S.C. 41 et seq.), or any other provision of law.

(j) Report to Congress; legislative recommendations

Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

(k) If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103(a) of title 5 of the United States Code), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

AS FILED WITH THE SECURITIES AND EXCHANGE COMMISSION ON FEBRUARY 7, 2002

REGISTRATION NO. 333-74798

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

AMENDMENT NO. 3 TO

FORM S-4
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

CONOCOPHILLIPS
(FORMERLY KNOWN AS
CORVETTEPORSCHE CORP.)
(Exact name of Registrant as specified in its charter)

DELAWARE	2911	01-0562944
(State or other jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification No.)

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600 NORTH DAIRY ASHFORD ROAD
HOUSTON, TEXAS 77079
(281) 293-1000
(Address, including zip code, and telephone number, including area code, of Registrant's principal executive offices)

RICK A. HARRINGTON, ESQ.	**J. BRYAN WHITWORTH, ESQ.**
SENIOR VICE PRESIDENT AND GENERAL COUNSEL CONOCO INC. 600 NORTH DAIRY ASHFORD ROAD	**EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL AND CHIEF ADMINISTRATIVE OFFICER PHILLIPS PETROLEUM COMPANY**

* * *

THE MERGER

The discussion in this joint proxy statement/prospectus of the merger and the principal terms of the merger agreement dated as of November 18, 2001, by and among Conoco, Phillips, New Parent, Corvette Merger Corp. (which was renamed C Merger Corp.) and Porsche Merger Corp. (which was renamed P Merger Corp.), is subject to, and is qualified in its entirety by reference to, the merger agreement, a copy of which is attached as Annex A to this joint proxy statement/prospectus and is incorporated in this joint proxy statement/prospectus by reference.

GENERAL DESCRIPTION OF THE MERGER

Pursuant to the merger agreement, P Merger Corp. will merge with and into Phillips and C Merger Corp. will merge with and into Conoco, with each of Phillips and Conoco surviving as wholly owned subsidiaries of New Parent. In the merger, each outstanding share of Conoco common stock, par value $0.01 per share, will be converted into the right to receive 0.4677 of a share of New Parent

common stock, par value $0.01 per share, and each outstanding share of Phillips common stock, par value $1.25 per share, will be converted into the right to receive one share of New Parent common stock. As a result,

- Conoco and Phillips will become wholly owned subsidiaries of New Parent, and
- former Conoco stockholders will hold approximately 43.4%, and former Phillips stockholders will hold approximately 56.6%, of the outstanding shares of New Parent common stock.

BACKGROUND TO THE MERGER

The oil and gas industry has experienced significant consolidation in recent years. Beginning with the merger of British Petroleum and Amoco Corp. in 1998, the consolidation continued with the merger of Exxon Corp. and Mobil Oil Corp. in 1999, the merger of Total Fina S.A. with Elf Aquitaine in 2000, the acquisition of Atlantic Richfield Co. by BP Amoco p.l.c. in 2000, the merger of Chevron Corporation and Texaco Inc. in 2001 and many smaller transactions.

In June 2000, Archie W. Dunham, Chairman of the Board, President and Chief Executive Officer of Conoco, contacted J.J. Mulva, Chairman of the Board and Chief Executive Officer of Phillips, regarding a possible merger of equals of the two companies. Several meetings and discussions ensued during the summer of 2000. In October 2000, Mr. Dunham proposed terms with respect to valuation based on a 20-day average trading price of each company's common stock, board size and composition, headquarters' location, company name and transaction structure. Mr. Dunham also proposed that he would serve as Chairman

of the Board, and that Mr. Mulva would serve as President and Chief Executive Officer, of the combined company and that the two of them would be jointly responsible for the selection, responsibilities, compensation and removal of the executive officers, management structure, long-range plans, major acquisitions and divestitures and major capital structure changes. However, Conoco and Phillips could not reach agreement on key terms and discussions were terminated in late October.

Following the termination of talks between Conoco and Phillips, each of Conoco and Phillips pursued alternative strategies to grow and increase shareholder value. Conoco acquired Gulf Canada Resources Limited in July 2001, and Phillips integrated Atlantic Richfield Co.'s Alaska production assets that Phillips had acquired in April 2000 and acquired Tosco Corporation in September 2001. As part of its consideration of its alternative strategies, Conoco retained Credit Suisse First Boston on April 9, 2001, to provide certain financial advisory services to Conoco regarding possible transactions.

Following its acquisition of Tosco, Phillips again examined a number of potential acquisitions of both large and small companies and assets and other strategic business opportunities in the upstream sector. None of the alternatives considered was as large a transaction as the merger, offered comparable synergies, was as financially attractive or offered as comprehensive and complementary a fit for Phillips as a business combination with Conoco. Based on management analyses, the Phillips Board of Directors concluded that a business combination with Conoco presented the best strategic opportunity for Phillips and its stockholders.

On September 10, 2001, at its regular meeting, the Phillips Board of Directors authorized Mr. Mulva to contact Mr. Dunham to initiate a discussion about a possible business combination between Phillips and Conoco.

Later in the week of September 10, 2001, Mr. Mulva's office contacted Mr. Dunham's office and a meeting between Messrs. Dunham and Mulva was scheduled for September 28, 2001.

On September 28, Mr. Dunham and Mr. Mulva met in Oklahoma City. At that meeting Mr. Mulva outlined his proposal for a business combination. Mr. Mulva also proposed that the selection of other executive officers for the combined company be from the existing executives of Conoco and Phillips on the basis of merit and that the name of the combined company be determined later. Mr. Dunham and Mr. Mulva also discussed possible headquarters and other significant locations for the combined company.

On October 8, 2001, at the regular meeting of the Phillips Board of Directors, Mr. Mulva reported on his meeting with Mr. Dunham. The Phillips Board of Directors authorized Mr. Mulva to continue to negotiate the terms of a possible merger of equals with Mr. Dunham. Throughout the period from October 3 through November 17, Mr. Mulva had regular telephone conversations with the members of the Phillips Board of Directors, advising them of the status of the merger discussions.

On October 8, 2001, Mr. Dunham met with the Conoco Executive Committee and discussed the possibility of a combination with Phillips on terms comparable to those proposed by Mr. Dunham in October of 2000. The Executive Committee was supportive of continued discussions.

On October 11, 2001, Mr. Dunham and Mr. Mulva had a follow-up conversation by telephone in which they further discussed the proposals made by Mr. Mulva at their meeting on September 28, 2001, and agreed to meet in Houston on October 16, 2001.

On October 16, 2001, Mr. Dunham and Mr. Mulva met in Houston to discuss each company's vision, strategies, long-range objectives, values and culture. At the conclusion of that meeting, Messrs. Dunham and Mulva agreed that the general counsels of each company should meet to discuss certain matters relating to Phillips' recent acquisition of Tosco about which Mr. Dunham and his management team wished to be better informed before proceeding further with the merger discussions.

On October 19, 2001, Rick A. Harrington, Senior Vice President and General Counsel of Conoco, and J. Bryan Whitworth, Executive Vice President, General Counsel and Chief Administrative Officer of Phillips met in New York. At that meeting Messrs. Harrington and Whitworth, assisted by other members of the management of each company, discussed Phillips' recent acquisition of Tosco. In addition, Messrs. Harrington and Whitworth, together with Conoco's and Phillips' respective legal advisors, also discussed Conoco's recent acquisition of Gulf Canada and various structuring and timetable issues with respect to a potential transaction.

On October 24, 2001, Mr. Dunham and Mr. Mulva spoke again by telephone and determined that they were satisfied with the reports received on the meeting between their general counsels. Mr. Dunham informed Mr. Mulva that he would discuss the proposed combination of Conoco and Phillips at the upcoming meeting of the Conoco Board

of Directors on October 30 and agreed to meet again with Mr. Mulva on November 1, 2001, if the Conoco Board of Directors was favorably disposed toward proceeding to negotiate a transaction.

During the meeting of the Conoco Board of Directors on October 30, 2001, Mr. Dunham reported on his discussions with Mr. Mulva regarding the merger. The Conoco Board of Directors authorized Conoco's management to continue to negotiate the terms of a possible merger of equals with Phillips.

On November 1, 2001, Mr. Dunham and Mr. Mulva met again in Houston. At that meeting Mr. Dunham made a proposal for valuing the two companies based on the average trading price of each company's common stock for the 20 trading days prior to signing the merger agreement. Mr. Dunham also proposed a holding company structure with Conoco and Phillips becoming subsidiaries of a new company to be named "ConocoPhillips." Mr. Dunham agreed that he would delay his retirement in order to serve as Chairman, and that Mr. Mulva would serve as President and Chief Executive Officer, of the combined company. Messrs. Dunham and Mulva further discussed the appropriate division of their roles and responsibilities as Chairman and President and Chief Executive Officer, respectively, of the combined company.

On November 2, 2001, at the instruction of Mr. Whitworth, Phillips' legal advisors sent a draft of a merger agreement to Conoco's legal advisors. Conoco and Phillips and their respective legal advisors began negotiating the merger agreement and other documents related to the proposed transaction on November 5, 2001 and negotiations on

principal legal issues, including appropriate deal protections, continued through November 17, 2001.

On November 4, 2001, Mr. Dunham and Mr. Mulva again spoke by telephone. They agreed, subject to due diligence and to the resolution of remaining issues, that the valuation of the two companies should be based on the average trading price of each company's common stock for the 20 trading days prior to signing the merger agreement and that the transaction should utilize a holding company structure. They also further discussed the governance arrangements for the combined company and agreed that Messrs. Harrington and Whitworth should propose language on this subject to be incorporated in the by-laws of the combined company and in the employment agreements to be entered into in connection with the proposed transaction. Mr. Dunham and Mr. Mulva agreed that the headquarters of the combined company would be in Houston but that the company would maintain a significant and continuing presence in Oklahoma. They also discussed procedural matters, including a timetable for the proposed transaction.

On November 6, 2001, Conoco and Phillips entered into a mutual confidentiality agreement governing the exchange of confidential information during each company's due diligence review of the other.

Beginning November 7, 2001, a team of Conoco managers led by Philip L. Frederickson, Conoco's Senior Vice President for Corporate Strategy and Business Development, and a team of Phillips' managers led by John E. Lowe, Phillips' Senior Vice President, Corporate Strategy and Development, and John A. Carrig, Phillips' Senior Vice President and Chief Financial Officer, met in New York to

discuss financial and accounting issues and potential synergies arising from combining the two companies.

On November 9, 2001, Conoco retained Morgan Stanley & Co. Incorporated and Phillips retained Goldman, Sachs & Co., as their respective financial advisors. On November 14, 2001, Conoco also retained Salomon Smith Barney Inc. and Credit Suisse First Boston Corporation as its financial advisors and Phillips also retained J.P. Morgan Securities Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated as its financial advisors. Pursuant to the terms of its April 9, 2001 engagement Credit Suisse First Boston was entitled to be engaged by Conoco as a financial advisor in connection with the merger, and, in connection with the merger, it was asked to continue to make available its expertise on alternative transactions based upon work it had performed for Conoco in the past.

On November 11 and 12, 2001, teams of Conoco and Phillips management held a series of meetings in New York to discuss the operations of the various business units of their respective companies and to exchange due diligence materials covering the major business units of each company. These materials included financial models, which were within the range of publicly available financial projections. (Conoco and Phillips did not subsequently exchange, directly or indirectly, financial modeling information.) Management representatives from each company's human resources, legal, finance and accounting, and health, safety and environmental organizations also met to exchange due diligence materials. Following these meetings, the companies continued to discuss financial and accounting issues and to perform further due diligence on each other.

On November 11 and 12, 2001, Mr. Mulva and Mr. Dunham again spoke by telephone. In these conversations, each expressed satisfaction with the progress of the meetings between their respective management teams and each agreed that they would present the final terms of the transaction for consideration by their respective boards at special meetings to be scheduled for the coming weekend. On November 13, 2001, as contemplated by the Tax Sharing Agreement, dated as of October 27, 1998, by and among E. I. Du Pont de Nemours and Company and Conoco, entered into at the time of Du Pont's divestiture of Conoco, Conoco delivered to Du Pont tax opinions of its and Phillips' legal advisors regarding the effect of the proposed business combination between Conoco and Phillips on the tax treatment of the split-off by Du Pont of its investment in Conoco in August 1999 under Section 355 of the Code. On November 16, 2001, Du Pont advised Conoco that the foregoing opinions were acceptable to it. As a result of Du Pont's acceptance of the tax opinions, Conoco complied with the conditions precedent in the Tax Sharing Agreement to its entry into the merger agreement with Phillips.

On November 16, 2001, the Conoco Board of Directors held a special meeting in Houston at which Conoco's senior management and its financial and legal advisors were present. Senior management made presentations on the background and strategic rationale for the proposed combination with Phillips. Morgan Stanley made a presentation on the financial aspects of the transaction and Conoco's legal advisors reviewed the terms of the proposed merger agreement and the proposed governance of the combined company and discussed various legal and regulatory issues relating to the proposed combination.

Members of the Conoco compensation committee shared the highlights of their discussions regarding, and stated their support for, the new employment agreement and compensation arrangements that Conoco and New Parent would enter into with Mr. Dunham. Following further discussion, the Conoco Board of Directors agreed to meet again on November 18 for further deliberation by the directors, pending the outcome of the special meeting of the Phillips Board of Directors scheduled for November 17, 2001.

On November 17, 2001, the Phillips Board of Directors held a special meeting in New York at which Phillips' senior management and its financial and legal advisors were present. Senior management made presentations on the background and strategic rationale for the proposed combination with Conoco. On behalf of all three financial advisors, Goldman Sachs made a presentation on the financial aspects of the transaction. Each of the three financial advisors delivered its oral opinion, subsequently confirmed in writing on November 18, 2001, that the exchange ratio of one share of New Parent common stock for each share of Phillips common stock relative to the exchange ratio of 0.4677 of a share of New Parent common stock for each share of Conoco common stock, was fair from a financial point of view to the holders of Phillips common stock. Phillips' legal advisor reviewed with the Phillips Board of Directors the terms of the proposed merger agreement and the fiduciary duties of the Phillips Board of Directors. The Phillips Board of Directors also discussed the employment agreement and compensation arrangements that Conoco and New Parent would enter into with Mr. Dunham and discussed and approved the

employment agreement and other compensation arrangements that Phillips and New Parent would enter into with Mr. Mulva. Following further discussion, the Phillips Board of Directors unanimously determined that the terms of the merger agreement and the transactions contemplated by that agreement are advisable, fair to and in the best interests of Phillips and its stockholders, unanimously approved the merger agreement and the transactions contemplated by that agreement and unanimously recommended that the merger agreement be adopted by the holders of Phillips common stock.

On the evening of November 17, 2001, Phillips and Conoco and their respective legal advisors completed preparation of the merger agreement, the related schedules and exhibits and the employment agreements for Messrs. Dunham and Mulva to put them in form for signatures.

On November 18, 2001, a special meeting of the Conoco Board of Directors was held. At that meeting, Morgan Stanley and Conoco's legal advisors updated the Conoco Board of Directors on developments regarding the exchange ratio, the terms of the merger agreement and other matters. In addition, Morgan Stanley delivered its oral opinion, subsequently confirmed in writing, and Salomon Smith Barney delivered its written opinion that the exchange ratio of 0.4677 shares of New Parent common stock for each share of Conoco common stock was fair from a financial point of view to the holders of Conoco common stock. Credit Suisse First Boston was not requested to provide, and did not provide, a fairness opinion. The Conoco Board of Directors also discussed the employment agreement and compensation arrangements that Conoco and New Parent would enter into with Mr. Dunham.

Following further discussion, the Conoco Board of Directors unanimously determined that the terms of the merger agreement and the transactions contemplated by that agreement are advisable, fair to and in the best interests of Conoco and its stockholders, approved the merger agreement and the transactions contemplated by that agreement and recommended that the merger agreement be adopted by the holders of Conoco common stock and unanimously approved the terms of the employment agreement and compensation arrangements that Conoco and New Parent would enter into with Mr. Dunham.

On November 18, 2001, the definitive agreements providing for the merger were executed. That afternoon Conoco and Phillips issued a joint press release announcing the transaction.

* * *

Title 16 – Commercial Practices

CHAPTER I – FEDERAL TRADE COMMISSION

SUBCHAPTER H – RULES, REGULATIONS, STATEMENTS AND INTERPRETATIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS

AGENCY: Federal Trade Commission.

ACTION: Promulgation of final rules.

SUMMARY: The purpose of this document is formally to promulgate final rules implementing title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, relating to premerger notification. The document consists of final rules, including a Notification and Report Form, and a statement of basis and purpose. Under the statute, the Federal Trade Commission was directed to promulgate, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, rules implementing a premerger notification program. The effect of the final rules is to implement such a program, by explaining the coverage of the program, certain exemptions from the program, and the means by which persons must comply with their obligations under the program.

EFFECTIVE DATE: August 30,1978.

FOR FURTHER INFORMATION CONTACT:

Malcolm R. Pfunder, Associate Director for Premerger Notification, Bureau of Competition,

Room 303, Federal Trade Commission, Washington, D.C. 20580, telephone: 202/523-3894.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Commission and the Assistant Attorney General advance notice and to wait certain designated periods before consummation of such plans. The transactions to which the advance notice requirement is applicable and the length of the waiting periods required are set out in the act, the complete text of which is reprinted below.

The rules are divided into three parts. Part 801 defines a number of the terms used in the act and the rules and explains which acquisitions are subject to reporting and waiting period requirements. Part 802 contains a number of exemptions from the requirements. Part 803 explains the procedures for complying with the act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to part 803 of the rules. The amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions, but instead provides the enforcement agencies with advance notice of, and information about, certain transactions, and with an opportunity to seek a preliminary injunction in Federal district court to prevent consummation of any such transactions which may, if consummated, violate the antitrust laws.

Section 7A of the Clayton Act provides:

"Sec. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if?

"(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce:

"(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $10,000,000 or more;

"(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more, or

"(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

"(3) as a result of such acquisition, the acquiring person would hold –

"(A) 15 per centum or more of the voting securities or assets of the acquired person, or

"(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

"(b) (1) The waiting period required under subsection (a) shall –

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the 'Assistant Attorney General') of –

"(i) the completed notification required under subsection (a), or "(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

"(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

"(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the FEDERAL REGISTER a notice that neither intends to take

any action within such period with respect to such acquisition.

"(3) As used in this section –

"(A) The term 'voting securities' means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or with respect to unincorporated issuers, persons exercising similar functions.

"(B) The amount of percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

"(c) The following classes of transactions are exempt from the requirements of this section –

"(1) acquisitions of goods or realty transferred in the ordinary course of business;

"(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisitions;

"(4) transfers to or from a Federal agency or a State or political subdivision thereof;

"(5) transactions specifically exempted from the antitrust laws by Federal statute;

"(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal

agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(7) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

"(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), sections 403 and 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730(a), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

"(9) acquisition, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

"(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

"(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting

securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

"(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B).

"(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section –

"(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisitions may, if consummated, violate the antitrust laws; and

"(2) may –

"(A) define the terms used in this section;

"(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

"(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

"(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed

acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

"(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

"(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 or section 1 or 2 of the Sherman Act, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition

pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection –

"(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

"(B) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

"(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

"(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e)(2), the United States district court –

"(A) may order compliance;

"(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

"(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate.

upon application of the Federal Trade Commission or the Assistant Attorney General.

"(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or Judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

"(i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of Law.

"(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

"(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section."

STATEMENT OF BASIS AND PURPOSE OF RULES IMPLEMENTING TITLE II OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

On September 30, 1976, President Gerald Ford signed into law the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390. Section 201 of that statute added a new section 7A to the Clayton Act, 15 U.S.C. 18A (referred to in this Statement of Basis and Purpose as "the act"), relating to premerger notification.

The act creates a requirement that "persons" of specified size or larger, which intend to make voting securities or asset acquisitions of specified size or larger, must report their intentions in advance and provide information relevant to the transaction to the Antitrust Division of the Department of Justice and to the Federal Trade Commission. After reporting, those persons must wait a prescribed period of time before consummating the

reported transaction. That waiting period may be extended by either enforcement agency by means of a request for additional information or documentary material. The act also contains 11 specific types of exemptions, along with a grant of rulemaking authority to define any terms used in the act, to create additional exemptions, and generally to carry out the purposes of the act.

The act provides for expedited consideration by a Federal district court in the event that either agency seeks a preliminary injunction to prevent consummation of an acquisition. It also contains penalty and enforcement provisions, a requirement that information filed by reporting persons not be made public except under certain circumstances, provisions clarifying the relationship between the act and certain substantive and procedural aspects of other antitrust laws, and the requirement of an annual report to the Congress.

Rulemaking authority under section 7A(d) of the act is conferred upon the Federal Trade Commission, and that provision requires that the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (referred to hereafter as the "Assistant Attorney General") concur in the rules. That section also makes applicable the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553, and requires that any rules issued must be consistent with the purposes of the act.

Section 553 of the Administrative Procedure Act requires that an agency that intends to promulgate rules must first publish a "general notice of proposed rulemaking" in the FEDERAL REGISTER. After giving notice, the

agency is required to "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, arguments with or without opportunity for oral presentation." Thereafter the agency may adopt and issue final rules; incorporated in those rules must be "a concise general statement of their basis and purpose." The statute also requires that final rules of a substantive nature normally be published or served upon affected persons not less than 30 days before their effective date.

On December 15, 1976, the Federal Trade Commission, with the informal concurrence of the Assistant Attorney General, issued proposed rules and a proposed Notification and Report Form sometimes referred to hereafter as the "form") to implement the act. The proposed rulemaking was published in the FEDERAL REGISTER of December 20, 1976, 41 FR 55488, and is hereafter referred to as the "original" rules and form. The 30-day comment period was extended, by the Commission on January 12, 1977, and expired on February 18, 1977. One hundred thirty-three comments became part of the rulemaking record in connection with the original rules and form. A list of these comments, and of those received during the later comment period, appears at the end of the Statement of Basis and Purpose. Each comment has been assigned a number, and throughout this statement individual comments are referred to by these numbers.

Because of the extensiveness of public comment, it became clear to the Commission that some substantial revisions would have to be made in the original rules. On July 25, 1977, the Commission determined that additional public comment on the rules would be desirable and approved revised proposed rules and a revised proposed

Notification and Report Form (hereafter referred to as the "revised" rules and form). The revised rules and form were published in the FEDERAL REGISTER of August 1, 1977, 42 FR 39040, and a 30-day comment period began on that date. In response to numerous requests for additional time for comment, the Commission on August 23, 1977, extended the comment period by 30 days, through September 30, 1977. A total of 116 comments were received on the revised rules and form.

Additional changes in the revised rules and form were made after the close of the comment period, and on February 14, 1978, the Commission gave its interim approval to final versions of the rules and form (referred to hereafter as the "final" rules and form). The Notification and Report Form was then transmitted to the General Accounting Office for review under the Federal Reports Act, 44 U.S.C. 3502. The General Accounting Office submitted its report to the Commission on May 12, 1978. The Commission formally promulgated the final rules and form and issued this Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The final rules and form and this Statement of Basis and Purpose were published in the FEDERAL REGISTER of July 31, 1978, 43 FR 33451, and will become effective on August 30, 1978.

* * *

persons or entities not included within the acquiring person, see § 801.1(d), final item 3 has been amended to remove this separate reporting requirement.

ITEM 4

Item 4 requires the reporting person to furnish copies of a number of documents commonly prepared for filing with the SEC or for other corporate purposes. The reporting person must submit copies of its own documents and, if entities included within the reporting person have their own documents that are different from those of the reporting person, copies of those entities' documents as well.

In the heading to the item, the reference to documents "of the person filing notification" merits explanation. If the person is a corporation that treats all its controlled (as defined in § 801.1(b)) subsidiaries as components of a single unit, then the documents "of the person" naturally will be the documents that apply to that corporation.

ITEM 4 (a)

Item 4(a) requires the reporting person to furnish copies of certain documents if they were filed with the SEC within 3 years prior to the date of filing the notification and report form, or if they are to be filed contemporaneously with the SEC in connection with the acquisition. These documents include the most recent proxy statement and most recent form 10-K. In addition, all registration statements, forms 10-Q and forms 8-K filed since the end of the period reflected by the most recent form 10-K must be submitted. If the acquisition is a tender offer, schedule 14D-1 must also be submitted if it has already been filed with the SEC or will be filed with the SEC contemporaneously with the filing of the notification and report form with the Commission and the Assistant Attorney General. If schedule 14D-1 has not been filed with the SEC prior to the filing of the notification and report form, and will not

be filed contemporaneously with the notification and report form, it need not be submitted in response to item 4(a).

BACKGROUND INFORMATION TO ITEM 4(a)

The documents requested by Item 4(a) contain information which will prove helpful to the enforcement agencies in evaluating the impact of the acquisition upon competition. Since these documents will be readily at hand, requiring their submission imposes no undue burden on reporting person.

If the reporting person does not have copies of responsive documents readily available, the reporting person may instead identify each document and indicate its date and place of filing.

Item 4(a) has undergone some change since the original form. First, original item 4(a) required the submission of the most recently filed copies of all enumerated types of documents, regardless of how long ago such documents may have been filed. Several comments (e.g., 11, 15, 59, 77, 104) argued that only relatively recent documents would be useful for review purposes. Accordingly, the final item required that such documents be submitted only if they were filed with the SEC within the 3 years prior to the date of filing of the notification and report form. Second, the revised item required the reporting person to submit all registration statements filed with the SEC during the 3 years prior to the filing of the premerger notification report. Comment 1091 noted that all of this information, to the extent not outdated, would be included in the most recent form 10-K. The final version

requires the submission of only those registration statements filed since the end of the period reflected by the most recent form 10-K.

The SEC comment (1058) suggested that problems could arise with regard to the filing of SEC schedule 14D-1, relating to tender offers. The comment suggested that in many cases tender offerors will not have access to all of the information required to be disclosed under schedule 14D-1 at the time of submission of the notification and report form and thus may not have prepared schedule 14D-1 at time of filing the form. Under these circumstances, to require the submission of schedule 14D-1 at the time of filing might delay the filing until schedule 14-1 was completed. The comment recommended that item 4(a) of the notification and report form be construed in such a manner as to require schedule 14D-1 to be submitted to the Commission and the Assistant Attorney General as a supplement to item 4(a) contemporaneously with its filing with the SEC.

The final version of item 4(a) does not follow the suggestion of the SEC. The final rules require that the reporting person submit schedule 14D-1 in response to item 4(a) only if the schedule has already been filed with the SEC or will be filed with the SEC contemporaneously with the filing of the notification and report form. Instead of requiring a supplemental filing, whenever the schedule is unavailable at the time the acquiring person completes item 4(a), the agencies may request it as part of a second request. Furthermore, reporting persons may wish to submit schedule 14D-1 voluntarily as a supplement to item 4(a). See § 803.1(b).

Another comment (35) suggested that submission of the requested documents under item 4(a) was unnecessary because these documents are available from the SEC. Although the documents are generally available, the agency staffs will be under severe time constraints in reviewing filings under the act. Obtaining the required documents for each reporting person would be extremely time-consuming. The added burden of requiring the agencies to obtain these documents from the SEC would impede the effective and timely review envisioned by the act. By contrast, for reporting persons the burden of submitting copies of these documents should be minimal, if copies are available.

Finally, comment 77 suggested that reporting persons furnish only those documents filed with the SEC that contain primarily financial statements, rather than nonfinancial information such as proxy statements. The final version of the item does not follow this suggestion. Regardless of the presence of financial statements, SEC filings are likely to contain information concerning the structure, operations and plans of the person that will facilitate review of the acquisition by the agencies.

ITEM 4(b)

Item 4(b) requires the reporting person to furnish copies of the most recent annual reports and annual audit reports of the person filing notification and of all unconsolidated United States issuers included within the person. In addition, if the most recent regularly prepared balance sheets of the person or of the unconsolidated United States issuers contain information more recent than (and different from) that contained in the most recent

annual report and annual audit report, the balance sheets must also be submitted. This situation may rise, for example, when the most recent regularly prepared balance sheet is a quarterly or monthly balance sheet prepared after the most recent annual report. The term "unconsolidated issuer" means an entity whose operations and financial position are not reflected in the financial statements of the ultimate parent entity or the entire reporting person. It is immaterial for purposes of item 4(b) whether such unconsolidated issuers are involved in the reported acquisition. The term "United States issuer" is defined in § 801.1(e)(1)(ii). Note that all persons must respond to item 4(b) without regard to whether they are required to file reports with the SEC.

BACKGROUND INFORMATION TO ITEM 4(b)

The annual reports, audit reports, and balance sheets to be submitted in response to item 4(b) constitute basic data that the agencies will employ in gaging the likely impact of the acquisition upon competition. Original item 4(b) would have required the submission of "all documents issued during the 3 years prior to the filing of this report which contain information directly pertaining to the reported transaction." A large number of comments (e.g., 15, 28, 30, 37, 41) criticized the breadth and obscurity of this language. In response to these comments, the information sought under original item 4(b) is described in more detail in the final version of item 4(c).

The revised version of item 4(b) was substantially similar to the final version. However, revised item 4(b) would have required the reporting person to furnish information for all unconsolidated entities included within

the reporting person. Several comments (e.g., 1026, 1094, 1099) criticized the requirement of submitting such documents for unconsolidated foreign entities. One comment (1094) suggested that the submission of such documents for unconsolidated foreign entities might violate foreign corporate secrecy statutes. The Commission reexamined the need for these statements, and determined that information regarding foreign entities can be relegated to requests for additional information. Accordingly, final item 4(b) requires the submission of annual reports, annual audit reports, and regularly prepared balance sheets only for unconsolidated "United States issuers" included within the reporting person. This amendment renders item 4(b) consistent with items 5, 7 through 9, and the insurance appendix, which require the submission of information with respect to United States operations alone. See § 803.2(c).

ITEM 4(c)

Item 4(c) requires the submission of all studies, surveys, analyses and reports prepared by or for officers or directors for the purpose of evaluating or analyzing the acquisition with respect to various aspects of competition.

The reporting person must submit only those documents prepared in connection with the reported acquisition. Documents pertaining to other mergers or acquisitions by the acquiring person, even if in the same market as the acquired person in the reported transaction, need not be submitted. Further, only those documents relating to markets, competition, competitors, potential for sales growth or expansion into product or geographic markets, and geographic and product market shares need

be supplied. Documents relating to other matters, such as pension arrangements, labor contracts, financing agreements or securities matters need not be supplied. Finally, only documents prepared "by or for any officer(s) or director(s)" need be submitted. Officers or directors of any entity included within the reporting person meet this standard. The language "by or for" embraces documents prepared by any persons, including consultants, for officers or directors. The date of preparation and name and title of the individual who prepared each document must be indicated if not contained in the document itself.

Background Information To Item 4(c)

Item 4(c) requires the submission of documents that the Commission views as essential to perform preliminary evaluations of mergers or acquisitions adequately. Internal documents of the parties to an acquisition provide a perspective on matters of antitrust concern that even detailed statistical information is unlikely to yield. SIC data, while the most satisfactory data available, are occasionally imperfect for determining product markets. Likewise, the other items on the form, while designed to elicit appropriate information, cannot be expected to answer all of the basic questions in every acquisition. The agencies have found from past experience that the viewpoints of the participants are extremely valuable in analyzing the antitrust implications of an acquisition and have determined that some of these perceptions are indispensable to the preliminary review envisioned by the act. As later portions of this discussion indicate, the final version of the items represents a substantial reduction in the scope of the document request.

Furthermore, the documents submitted under this item will enable the agency staffs to determine rapidly which statistical information is likely to be important. Since the waiting period may provide a very short time in which to analyze a relatively complex acquisition acceleration, of the review process by means of internal documents is essential.

Item 4(c) and its earlier drafts provoked many critical comments. Comment 35, for instance, suggested that any information derived from documents sought under either version of the item would be speculative at best. Numerous other comments considered the documents more properly the subject of a request for additional information and documentary material (e.g., 59, 85, 87, 94, 111, 115, 120; 1075, 1104), or a discovery motion in the course of litigation (e.g., 112; 1108). The Commission disagrees. Item 4(c) requests the production of a narrow class of documents that is necessary and appropriate for purposes of preliminary antitrust review. As noted by Congressman Rodino on the House floor:

> [I]n most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.

122 Cong. Rec. H10293 (daily ed. Sept. 16, 1976). Documents analyzing or evaluating a merger generally form the basis of a party's decision to proceed with an acquisition. As such, those documents are highly relevant for review purposes. In light of the agencies' congressional mandate to evaluate reported mergers and acquisitions effectively, any further limitation on the scope of item 4(c)

would seriously impair the agencies' efforts to fulfill their delegated responsibility.

A large number of comments (e.g., 37, 59, 63, 70, 77, 78, 101, 109, 111, 112, 120; 1050, 1088) recommended that documents containing sensitive financial information or trade secrets be exempt from production under item 4(c). This suggestion was rejected. The Commission believes that fears of improper public disclosure of confidential information are unfounded in light of § 7A(h). That subsection provides that information filed with the agencies is exempt from disclosure under the Freedom of Information Act, and may not be made public except in an administrative or judicial proceeding, or to Congress.

* * *

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **Phillips Petroleum Company,** a corporation, and **Conoco Inc.,** a corporation.	**Docket No. C-4058**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Phillips Petroleum Company has entered into an agreement to merge with Conoco Inc., all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

Phillips Petroleum Company

1. Respondent Phillips Petroleum Company ("Phillips") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place

of business at Phillips Building, Bartlesville, Oklahoma 74004.

2. Respondent Phillips is, and at all times relevant herein has been, engaged in, among other things, the bulk supply, terminaling and marketing of light petroleum products, the bulk supply of propane, the gathering of natural gas and the fractionation of raw mix in the United States.

3. Respondent Phillips had total revenues of $47.7 billion in 2001.

Conoco, Inc.

4. Respondent Conoco Inc., ("Conoco") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 600 North Dairy Ashford Road, Houston, Texas 77079.

5. Respondent Conoco is, and at all times relevant herein has been, engaged in, among other things, the bulk supply, terminaling and marketing of light petroleum products, the bulk supply of propane, the gathering of natural gas, and the fractionation of raw mix in the United States.

6. Respondent Conoco had total revenues of $39.5 billion in 2001.

II. THE MERGER

7. Respondents Phillips and Conoco plan a "merger of equals" in a transaction executed and announced on November 18, 2001. Under the terms of the agreement, Phillips shareholders will own about 56.6 percent and Conoco shareholders will own about 43.4

percent of the new company. Phillips shareholders will receive one share of new ConocoPhillips common stock for each share of Phillips they own and Conoco shareholders will receive 0.4677 shares of new ConocoPhillips common stock for each share of Conoco they own (the "Merger"). Phillips' market capitalization is approximately $18.5 billion and Conoco's is approximately $16.5 billion. The total dollar value of the Merger is approximately $35 billion.

III. TRADE AND COMMERCE

Eastern Colorado

8. A line of commerce in which to analyze the effect of the Merger is the bulk supply of light petroleum products ("LPPs"). LPPs include motor gasoline, diesel fuel, kerosene and jet fuel. For each product, there is no economic substitute.

9. A section of the country in which to analyze the effect of the Merger is the portion of Colorado east of the Continental Divide, a natural barrier between the eastern and western parts of Colorado ("Eastern Colorado"). This area includes the metropolitan statistical areas ("MSAs") of Denver, Colorado Springs, Fort Collins, and Boulder, Colorado.

10. The major buyers of LPPs in Eastern Colorado include wholesalers, known as jobbers or marketers. These entities buy large quantities of LPPs to resell to dealers (a person unaffiliated with a marketer or refiner that operates a gasoline outlet) or to sell directly to consumers.

11. Refineries produce LPPs and either deliver them into storage tanks or terminals on the premises or into large diameter refined products pipelines that, in

turn, deliver LPPs into storage tanks or terminals located near the consuming public. Refineries and large diameter pipelines are direct horizontal competitors to provide bulk supplies of LPPs.

12. Jobbers delivering LPPs in Eastern Colorado have no effective alternative to using local refineries or pipeline transportation that deliver LPPs into Eastern Colorado. Jobbers cannot economically access refineries and pipelines located outside of Eastern Colorado. Transporting LPPs into Eastern Colorado by truck is costly and is not a commercially reasonable substitute.

13. Bulk suppliers can identify and price differently to buyers ("targeted buyers") located in densely populated areas, like Denver and Colorado Springs, and raise price by a small but significant and nontransitory amount. Other jobbers in outlying areas are not capable of buying product and reselling to the targeted buyers. Bulk suppliers limit supplies that jobbers and marketers can buy and can identify where those supplies are delivered. Within Eastern Colorado, there are more narrow discrimination markets composed of densely populated areas, like Denver, Colorado.

14. Phillips owns a 70 percent undivided interest in the Borger-Denver pipeline that transports LPPs to Eastern Colorado from Phillips' Borger, Texas, refinery. Phillips is one of five interstate pipeline operators currently transporting LPPs to Eastern Colorado.

15. Conoco owns a refinery in Commerce City, Colorado, outside of Denver, which produces LPPs for Eastern Colorado. Conoco is one of two local refiners in Eastern Colorado.

16. Phillips and Conoco are direct horizontal competitors in Eastern Colorado. Phillips' owns a pipeline and Conoco owns a refinery that provide bulk supplies of LPPs into Eastern Colorado.

17. Together, respondents will own or control about 30 percent of the LPP bulk supply capacity in Eastern Colorado. The market, as measured by shipments or capacity, is highly concentrated with the HHI rising by over 500 points to above 2600.

18. After the Merger, the combined firm could effectively coordinate to raise prices in the market for LPP bulk supply in Eastern Colorado.

19. There are substantial barriers to entering the relevant market in Eastern Colorado. Building additional refineries locally or additional pipelines from refineries located outside of Eastern Colorado would be unlikely, take over two years, and therefore would not prevent respondents from raising prices above pre-Merger levels.

Northern Utah

20. A line of commerce in which to analyze the effect of the Merger is the bulk supply of LPPs. For each LPP, there is no economic substitute.

21. A section of the country in which to analyze the effect of the Merger is the portion of Utah north of the 39th parallel ("Northern Utah"). This area includes the Salt Lake City-Ogden and Provo-Orem MSAs.

22. The major buyers of LPPs in Northern Utah include wholesalers, known as jobbers or marketers. These entities buy large quantities of LPPs to resell to dealers or to sell directly to consumers.

23. Refineries produce LPPs and either deliver them into storage tanks or terminals on the premises or into large diameter refined products pipelines that, in turn, deliver into storage tanks or terminals located near the consuming public. Refineries and large diameter pipelines are direct horizontal competitors to provide bulk supplies of LPPs.

24. Jobbers delivering LPPs in Northern Utah have no effective alternative to using local refineries or pipeline transportation that deliver LPPs into Northern Utah. Jobbers cannot economically access refineries and pipelines located outside of Northern Utah. Transporting LPPs into Northern Utah by truck is costly and is not a commercially reasonable substitute.

25. Bulk suppliers can identify and price differently to targeted buyers located in densely populated areas, like Salt Lake City, and raise price by a small but significant and nontransitory amount. Other jobbers in outlying areas are not capable of buying product and reselling to the targeted buyers. Bulk suppliers limit supplies that jobbers and marketers can buy and can identify where those supplies are delivered. Within Northern Utah, there are more narrow discrimination markets composed of densely populated areas, like Salt Lake City.

26. Phillips owns a refinery in Woods Cross, Utah, outside of Salt Lake City. The refinery produces LPPs for distribution in Northern Utah.

27. Conoco owns more than 50 percent of the Pioneer Pipeline. The Pioneer Pipeline carries LPPs to Northern Utah. Conoco owns more than 50 percent of the terminal connected to the Pioneer Pipeline. Conoco operates the Pioneer Pipeline and connected terminals. By virtue of its majority stake and

operatorship, Conoco controls the pricing of LPPs on the Pioneer Pipeline.

28. Phillips and Conoco are direct horizontal competitors in Northern Utah. Phillips owns a refinery and Conoco owns a pipeline that provide bulk supplies of LPPs into Northern Utah.

29. Together, respondents will account for about 25 percent of the LPP bulk supply capacity in Northern Utah. The market, as measured by shipments or capacity, is highly concentrated with the HHI rising by about 300 points to above 2100.

30. After the Merger, the combined firm could effectively coordinate to reduce supply, slow growth of supply, and raise prices in the market for LPP bulk supply in Northern Utah.

31. There are substantial barriers to entering the relevant market in Northern Utah. Building additional refineries locally or additional pipelines from refineries located outside of Northern Utah would be unlikely, take over two years, and therefore would not prevent respondents from raising prices above pre-Merger levels.

Spokane MSA

32. A line of commerce in which to analyze the effect of the Merger is the terminaling services for LPPs. LPP terminals are specialized facilities with large storage tanks used for the receipt and local distribution of LPPs by tank truck. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

33. A section of the country in which to analyze the effect of the Merger is the MSA of Spokane, Washington. LPP marketers in Spokane only can receive

terminaling services from terminals located in Spokane, Washington. LPP marketers in Spokane have no effective alternative to terminals located within Spokane and cannot economically access more distant terminals or other LPP pipelines outside of Spokane.

34. Phillips owns a terminal in Spokane, Washington, which provides terminaling services for Spokane.

35. Conoco owns a terminal in Spokane, Washington, which provides terminaling services for Spokane.

36. The market for terminal services in Spokane is highly concentrated with the HHI rising by over 1600 points to 5000. Conoco and Phillips are two of three suppliers of terminal services.

37. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of terminal services in Spokane.

38. There are substantial barriers to entering the relevant market in Spokane. Building additional terminals in Spokane would be unlikely, ~~take~~ over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Wichita, Kansas

39. A line of commerce in which to analyze the effect of the Merger is the terminaling services for LPPs. LPP terminals are specialized facilities with large storage tanks used for the receipt and local distribution of LPPs by tank truck. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

40. A section of the country in which to analyze the effect of the Merger is the MSA of Wichita, Kansas.

LPP marketers in Wichita only can receive terminaling services from terminals located in Wichita. LPP marketers in Wichita have no effective alternative to terminals located within Wichita and cannot economically access more distant terminals or other LPP pipelines outside of Wichita .

41. Phillips owns a terminal in Wichita, which provides terminaling services for Wichita.

42. Conoco owns a terminal in Wichita, which provides terminaling services for Wichita.

43. The market for terminal services in Wichita is highly concentrated with the HHI rising by over 750 points to over 3600.

44. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of terminal services in Wichita.

45. There are substantial barriers to entering the relevant market in Wichita. Building additional terminals in Wichita would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Southern Missouri

46. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

47. A section of the country in which to analyze the effect of the Merger is the area located in southern Missouri – south and west of St. Louis ("Southern Missouri"). Propane wholesalers in Southern Missouri can only receive bulk quantities of propane

from propane terminals in Southern Missouri. Propane wholesalers cannot economically access refineries and pipelines located outside of Southern Missouri.

48. Phillips owns terminals located in Jefferson City, Missouri.

49. Conoco owns a propane terminal in Belle, Missouri.

50. Phillips and Conoco are two of four suppliers of bulk quantities of propane in Southern Missouri. The market is highly concentrated in Southern Missouri. The HHI increases by over 1200 points to 3700.

51. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in Southern Missouri.

52. There are substantial barriers to entering the relevant market in Southern Missouri. Building additional refineries or pipelines to transport propane to Southern Missouri would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

St. Louis, Missouri MSA

53. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

54. A section of the country in which to analyze the effect of the Merger is the MSA of St. Louis, Missouri. Propane wholesalers and local gas distribution companies in St. Louis can only receive bulk quantities of propane from local refineries and propane terminals in Southern Missouri. Propane

wholesalers cannot economically access refineries and pipelines located outside of St. Louis, Missouri.

55. Phillips owns a propane terminal located in East St. Louis, Illinois. It also owns a refinery in Wood River, Illinois.

56. Conoco owns a propane terminal in Wood River, Illinois.

57. Phillips and Conoco are two of three suppliers of bulk quantities of propane in St. Louis. The market is highly concentrated in St. Louis. The HHI increases by over 1000 points to over 7700.

58. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in St. Louis.

59. There are substantial barriers to entering the relevant market in St. Louis. Building additional refineries or pipelines to transport propane to St. Louis would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Southern Illinois

60. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

61. A section of the country in which to analyze the effect of the Merger is the area of Southern Illinois, approximately 100 miles to the east of the St. Louis MSA ("Southern Illinois"). Propane wholesalers in Southern Illinois can only receive bulk quantities of propane from local refineries and propane terminals

in Southern Illinois. Propane wholesalers cannot economically access refineries and pipelines located outside of Southern Illinois.

62. Phillips owns a propane terminal located in East St. Louis, Illinois. It also owns a refinery in Wood River, Illinois.

63. Conoco owns a propane terminal in Wood River, Illinois.

64. Phillips and Conoco are two of three suppliers of bulk quantities of propane in Southern Illinois. The market is highly concentrated in Southern Illinois. The HHI increases by over 1000 points to over 7700.

65. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in Southern Illinois.

66. There are substantial barriers to entering the relevant market in Southern Illinois. Building additional refineries or pipelines to transport propane to Southern Illinois would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

The Permian Basin

67. A line of commerce in which to analyze the effect of the Merger is natural gas gathering. Permian Basin natural gas producers contract with natural gas gatherers to transport and/or process the natural gas from the wells to processing plants. Permian Basin producers have no economic alternative to using natural gas gatherers to transport the natural gas.

68. Sections of the country in which to analyze the effect of the Merger are local areas within Lea

County, Eddy County and Chavez County, New Mexico, and Schleicher County, Texas ("Permian Basin Markets"). Consumption of natural gas in those areas of the Permian Basin is well below natural gas production levels. Most production is processed and transported to fractionators. Permian Basin producers cannot access gathering pipelines more the a few miles from their wells because of low production levels and the relatively high cost of building gathering pipelines. Small areas within the Permian Basin are relevant markets.

69. Phillips owns approximately 30 percent of Duke Energy Field Services ("DEFS"). DEFS owns significant natural gas gathering systems in the Permian Basin Markets.

70. Conoco owns significant gathering systems in the Permian Basin Markets.

71. DEFS and Conoco are the only two gatherers in the Permian Basin Markets. Those markets are highly concentrated.

72. After the Merger, the combined firm and DEFS would likely bid less aggressively to provide gathering services, resulting in higher gathering fees and less natural gas production.

73. There are substantial barriers to entering the relevant market in the Permian Basin Markets. Building additional pipelines in the Permian Basin Markets would be unlikely, take over two years, and therefore would not prevent respondents and DEFS from being able to maintain a price increase over pre-Merger levels.

Mont Belvieu, Texas

74. A line of commerce in which to analyze the effects of the Merger is fractionation. Fractionators are specialized facilities that separate raw mix natural gas liquids into specification products such as ethane or ethane-propane, propane, iso-butane, normal-butane, and natural gasoline by means of a series of distillation processes. These specification products are ultimately used in the manufacture of petrochemicals, in the refining of gasoline, and as bottled fuel, among other uses. There are no substitutes for fractionators for the conversion of raw mix into individual specification products.

75. A section of the country in which to analyze the effects of this transaction is Mont Belvieu, Texas. Mont Belvieu, Texas is an active fractionation center and natural gas liquids trading hub. Companies with pipeline access to Mont Belvieu have no economic alternative to using fractionation services in Mont Belvieu.

76. Phillips owns 30 percent of DEFS. Phillips may appoint two members of the DEFS board of directors. DEFS owns an interest in the Enterprise and Mont Belvieu I fractionators. By virtue of its ownership in DEFS, Phillips has access to competitively sensitive information of the Enterprise and Mont Belvieu I fractionators, and significant voting interests.

77. Conoco partially owns and operates Gulf Coast Fractionators. Conoco has access to competitively sensitive information of Gulf Coast Fractionators.

78. The market for fractionation in Mont Belvieu is highly concentrated.

79. After the Merger, the combined firm would have access to competitively sensitive information of Mont Belvieu fractionators accounting for more than 70 percent of the market capacity. The combined firm will also have veto rights over significant expansion decisions.

80. The Merger likely would reduce competition by allowing fractionation competitors to share information and exercise veto rights over expansion decisions.

81. Entry is unlikely to be timely or sufficient to defeat a price increase. Fractionation expansion is costly and would take more than two years.

COUNT I:
LOSS OF COMPETITION IN EASTERN COLORADO

82. Paragraphs 1-81 are incorporated by reference as if fully set forth herein.

83. One relevant product market in which to assess the effect of the Merger is the bulk supply of light petroleum products.

84. One relevant geographic market in which to assess the effect of the Merger is Eastern Colorado.

85. The Eastern Colorado market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

86. Entry into the Eastern Colorado market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

87. The Merger will eliminate ongoing competition between respondents with the likely result of reducing the output of LPPs in Eastern Colorado.

COUNT II:
LOSS OF COMPETITION IN NORTHERN UTAH

88. Paragraphs 1-87 are incorporated by reference as if fully set forth herein.

89. One relevant product market in which to assess the effect of the Merger is bulk supply of light petroleum products.

90. One relevant geographic market in which to assess the effect of the Merger is Northern Utah.

91. The Northern Utah market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

92. Entry into any of the Northern Utah market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

93. The Merger will eliminate ongoing competition in between the respondents in the Northern Utah market with the likely result of raising rates and reducing output of LPPs.

COUNT III:
LOSS OF COMPETITION IN SPOKANE, WASHINGTON

94. Paragraphs 1-93 are incorporated by reference as if fully set forth herein.

95. One relevant product market in which to assess the effect of the Merger is the provision of terminaling services of LPPs.

96. One relevant geographic market in which to assess the effect of the Merger is Spokane, Washington.

97. The Spokane market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

98. Entry into the Spokane market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

99. The Merger will threaten ongoing competition between the respondents in the Spokane market with the likely result of increasing terminaling services fees and reducing output of terminaling services in the relevant market, and thereby increasing the cost of LPPs.

COUNT IV:
LOSS OF COMPETITION IN WICHITA, KANSAS

100. Paragraphs 1-99 are incorporated by reference as if fully set forth herein.

101. One relevant product market in which to assess the effect of the Merger is the provision of terminaling services of LPPs.

102. One relevant geographic market in which to assess the effect of the Merger is Wichita, Kansas.

103. The Wichita, Kansas, market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

104. Entry into the Wichita, Kansas, market would not be timely, likely or sufficient to deter or counteract

likely anticompetitive effects arising from the Merger.

105. The Merger will threaten ongoing competition between the respondents in the Wichita, Kansas, market with the likely result of increasing terminaling services fees and reducing output of terminaling services in the relevant market, and thereby increasing the price of LPPs.

COUNT V:
LOSS OF COMPETITION IN SOUTHERN MISSOURI

106. Paragraphs 1-105 are incorporated by reference as if fully set forth herein.

107. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

108. One relevant geographic market in which to assess the effect of the Merger is Southern Missouri.

109. The Southern Missouri market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

110. Entry into the Southern Missouri market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

111. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing supplies of propane in the Southern Missouri market and thereby increasing the cost of propane for industrial and agricultural consumers.

COUNT VI:
LOSS OF COMPETITION IN THE ST. LOUIS, MSA

112. Paragraphs 1-111 are incorporated by reference as if fully set forth herein.

113. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

114. One relevant geographic market in which to assess the effect of the Merger is the MSA of St. Louis, Missouri.

115. The St. Louis MSA is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

116. Entry into the St. Louis MSA would not be timely, likely, or sufficient to deter or counteract likely anti-competitive effects arising from the Merger.

117. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing output of propane in the St. Louis MSA and thereby increasing the cost of propane and natural gas utility services.

COUNT VII:
LOSS OF COMPETITION IN SOUTHERN ILLINOIS

118. Paragraphs 1-117 are incorporated by reference as if fully set forth herein.

119. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

120. One relevant geographic market in which to assess the effect of the Merger is Southern Illinois.

121. The Southern Illinois market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

122. Entry into the Southern Illinois market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

123. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing output of propane in the Southern Illinois market and thereby increasing the cost of propane for industrial and agricultural consumers.

COUNT VIII: LOSS OF COMPETITION IN THE PERMIAN BASIN

124. Paragraphs 1-123 are incorporated by reference as if fully set forth herein.

125. One relevant product market in which to assess the effect of the Merger is gathering of natural gas.

126. Several geographic markets in which to assess the effect of the Merger are in the Permian Basin.

127. Each Permian Basin Market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

128. Entry into each Permian Basin Market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

129. The Merger will eliminate ongoing, actual potential and perceived potential competition between

respondents with the likely result of raising rates and reducing output of processed natural gas from the Permian Basin, and diminishing production of natural gas in the Permian Basin.

COUNT IX:
LOSS OF COMPETITION IN MONT BELVIEU

130. Paragraphs 1-129 are incorporated by reference as if fully set forth herein.

131. One relevant product market in which to assess the effect of the Merger is fractionation of natural gas.

132. The relevant geographic market in which to assess the effect of the Merger is Mont Belvieu, Texas.

133. The Mont Belvieu market is highly concentrated, and the merger, if consummated, will substantially increase that concentration.

134. Entry into Mont Belvieu would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

135. The Merger will eliminate ongoing competition between respondents with the likely result of raising prices and reducing output of fractionated specification products in Mont Belvieu, Texas.

IV. VIOLATIONS CHARGED

136. The merger agreement entered into by respondents Phillips and Conoco constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

137. The Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this thirtieth day of August, 2002, issues its complaint against respondents.

By the Commission.

SEAL

Donald S. Clark
Secretary